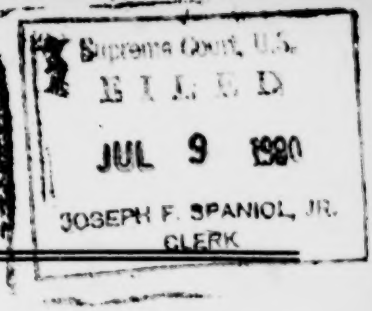
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NO. _____



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

P.A. HACKLER, DELORES HACKLER, KENNETH D. MOORE, MARY L. MOORE, KEMAL SAIED AND CONSTANCE G. SAIED,

Petitioners,

vs.

R. DOBIE LANGENKAMP,
Successor Trustee,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Attorneys for Petitioners

Dated July 6, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Whether 11 U.S.C. §547(c)(2) as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 is applicable to these adversary cases filed in 1985.

2. Whether Petitioners were denied due process when Respondent failed to give Petitioners notice of the Chapter 11 confirmation process although Petitioners were known to be preference creditors.

3. Whether Petitioners may assert their offsetting claims as defenses in preference actions.

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

P.A. Hackler, Delores Hackler, Kenneth D. Moore, Mary L. Moore, Kemal Saied, Constance G. Saied, C.A. Culp, Julia Culp, Culp Distributing Company, Hattie Lou Gesin, Leroy Dennis and Janet Dennis.[1]

(Appellants Below)

R. Dobie Langenkamp, Successor Trustee

(Appellee Below)

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[1] C.A. Culp, Julia Culp, Culp Distributing Company, Hattie Lou Gesin, Leroy Dennis and Janet Dennis have elected not to join in this Petition.

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THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN COURTS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported as In re Republic Trust and Savings Company, 897 F.2d 1041 (10th Cir. 1990).

The Findings of Fact and Conclusions of Law entered by the United States Bankruptcy Court for the Northern District of Oklahoma after a consolidated trial, is reported as In re Republic Financial Corporation, 75 Bankr. 840 (Bankr. N.D. Okla. 1987).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment sought to be reviewed is an opinion of the United States Court of

Appeals for the Tenth Circuit dated and entered March 5, 1990.

Rehearing was denied by order of the United States Court of Appeals for the Tenth Circuit on April 10, 1990.

This Court has jurisdiction to review the judgment in question by writ of certiorari under authority of 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §462(c), 98 Stat. 333, 378 and §553(a), 98 Stat. 333, 392 (1984).

11 U.S.C. §547(c)(2)(1978)(subsequently amended)

11 U.S.C. §547(c)(2)(1984)

11 U.S.C. §101(4)(A)

11 U.S.C. §101(9)(B)

11 U.S.C. §502(H)

11 U.S.C. §550

Bankruptcy Rule 2002(b)

Bankruptcy Rule 3017(d)

Bankruptcy Rule 7007

Bankruptcy Rule 7012

Rule 7(a), Fed.R.Civ.P.

Rule 12(b), Fed.R.Civ.P.

Rule 13, Fed.R.Civ.P.

STATEMENT OF THE CASE

Republic Trust and Savings Company ("RTS") and Republic Financial Corporation ("RFC") were two related uninsured non-bank banks located in Tulsa, Oklahoma, that filed for protection under Chapter 11 of the United States Bankruptcy Code (hereinafter the "Code") on September 24, 1984. During the ninety (90) day period prior to the filing of the bankruptcy petition, P.A. and Delores Hackler (the "Hacklers"), Kenneth D. and Mary L. Moore (the "Moores") and Kemal and Constance G. Saied (the "Saieds") (collectively the "Petitioners") along with over 1100 other customers withdrew funds on deposit in these institutions when their savings instruments, known as thrift certificates, reached maturity under the terms of the

certificates. Respondent has admitted that these withdrawals were made in the ordinary course of business of both the institutions and the Petitioners, and that these transactions were made according to ordinary business terms. Petitioners were unaware of any financial difficulties the institution would subsequently experience.

As Petitioners had no monies on deposit in the debtor institutions at the time of bankruptcy, Petitioners received no notice of the bankruptcy filing and filed no proofs of claim. Prior to confirmation of the plans of reorganization in these cases, Jack D. Jones, the trustee for these debtor institutions (the "Trustee"), identified each of the Petitioners as potential preference defendants who would have claims that would be treated as pre-petition claims

under the Code if the transfers were subsequently proven to be preferential. However, while he recognized Petitioners as members of a class of creditors that would be affected by the proposed plans, the Trustee failed to give Petitioners notice of the plans or the confirmation process. The Trustee simply ignored this class of creditors that included over 1100 people.

The Trustee[2] subsequently sued members of this class of creditors in over three hundred fifty lawsuits, alleging that these creditors who withdrew their

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2 The Trustee resigned as trustee in these bankruptcy cases and R. Dobie Langenkamp (hereinafter the "Respondent") was appointed Successor Trustee on May 9, 1986, and substituted as plaintiff in these actions in the Bankruptcy Court.

funds in the ordinary course of business were recipients of preferential transfers pursuant to 11 U.S.C. §547. The suits against the "first wave" of these depositors, which included Petitioners, were commenced in October, 1985. Approximately 250 cases that the Trustee or his successor has filed, remain stayed pending the outcome of this proceeding.

In June, 1987, The United States Bankruptcy Court for the Northern District of Oklahoma (hereinafter the "Bankruptcy Court") conducted a consolidated bench trial of eight of these cases, including those involving Petitioners, and found that Petitioners were recipients of preferential transfers, notwithstanding the fact that these preference cases were filed in October, 1985, and that, based on the stipulated facts submitted by the

parties, Petitioners met all of the requirements set forth in the "ordinary course of business" exception to the preference statute set forth in 11 U.S.C. §547(c)(2). The Bankruptcy Court ruled that the law to be applied to these cases was the law in existence prior to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, enacted July 10, 1984 (hereinafter "the 1984 Amendments"). The prior law required that the payment in question be made no more than 45 days after the making of a debt, to be within the exception to the preference statute. This requirement was deleted by Congress in the 1984 Amendments because of the havoc it was wreaking in the nation's commercial paper market. Section 553(a) of the 1984 Amendments states that the section

deleting the 45 day rule would become effective to cases filed 90 days after enactment, or October 8, 1984. The preference cases at issue were filed almost a year after the effective date in October, 1985. The Bankruptcy Court held that Congress intended the 1984 Amendment to be applicable only to bankruptcy cases filed after October 8, 1984, not preference cases.

The United States District Court for the Northern District of Oklahoma (hereinafter the "District Court") affirmed this decision on June 30, 1988, as did the United States Court of Appeals for the Tenth Circuit (hereinafter "the Tenth Circuit") in its opinion dated March 5, 1990. This decision by the Tenth Circuit is in direct conflict with decisions rendered by the United States Courts of

Appeals for the Third, Fourth, Sixth, Seventh and Eleventh Circuits. See, In re Harbour, 840 F.2d 1165, 1167 n.3 (4th Cir. 1988); Matter of Xonics Imaging, Inc., 837 F.2d 763 (7th Cir. 1988); In re K.C. Mach. & Tool Co., 816 F.2d 238 (6th Cir. 1987); Lellock v. Prudential Insurance Co. of America, 811 F.2d 186 (3d Cir. 1987); In re Chase and Sanborn Corporation, 813 F.2d 1177 (11th Cir. 1987).

As a result of the clear conflict that exists between the Tenth Circuit opinion and other circuits that have addressed the issue, this Court should grant the writ of certiorari requested by Petitioners in order to resolve this conflict.

In addition to the issue of the applicability of the 1984 Amendments, Petitioners asserted in the Bankruptcy

Court that even if it was found that Petitioners were the recipients of preferential transfers, because the Trustee failed to give Petitioners notice of the confirmation process and an opportunity to be heard on the plan, it would be a denial of due process to impair Petitioners' claims by a plan of reorganization they were not given notice of and were denied the right to be heard on. Consequently, pursuant to a long line of cases addressing this issue, Petitioners' claims would be unimpaired by the plan, which results in Petitioner having a complete set off to any and all monies disgorged by Petitioners to Respondent. New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293 (1953), Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Milikin v.

Meyer, 311 U.S. 457 (1940); Reliable Electric Co. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984).

On a motion for summary judgment the Bankruptcy Court held that Petitioners may very well have an offsetting claim, but such a claim must be asserted in the bankruptcy case, after the preference is disgorged.

At the close of trial, the Bankruptcy Court found that Petitioners, as preference creditors, were not entitled to notice and an opportunity to be heard on the plan of reorganization and confirmation procedure. The District Court affirmed this finding.

The Tenth Circuit in affirming the District Court on this issue refers to Petitioners' argument as "nonsensical." This argument can only be viewed in such a

way if the statutory scheme set forth in the Code is ignored and one disregards the line of cases decided by this and other courts requiring notice and an opportunity to be heard prior to the taking of property. The Code specifically dictates that all creditors are entitled to notice of the confirmation process and that a preference defendant has a resulting claim that will be treated under the Code as a pre-petition claim. This is to distinguish such a claim from one that arises post petition, and is, therefore, non dischargeable. However, if the preference claim is to be treated as a pre-petition claim, the same notice given every other holder of a pre-petition claim must be given to preference creditors, or their claims cannot be impaired by a plan of reorganization.

Regardless of whether you view these preference claims as arising post petition, or pre-petition with the accompanying fact that the holder received no notice of the confirmation process, the net effect is a claim that cannot be impaired and is a complete setoff to the claim asserted by the Respondent. (i.e., for each dollar disgorged by the transferee, he has a claim for one dollar against the estate.) The rule of law established in a long line of cases issued by this and other courts do not deviate from this fundamental principal.

Procedurally, the question then is whether this claim of setoff may be asserted as a defense in the adversary proceeding. It is only logical that to do otherwise is to create a condition precedent of going through oppressive litiga-

tion on the preference issue, in order to assert a setoff in a second action regarding claims arising out of the same transaction. This is inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure.

The opinion of the Tenth Circuit on this issue is an important question of federal law which should be settled by this Court and which has been decided by the Tenth Circuit in a way that is in conflict with a long line of decisions issued by this Court.

ARGUMENT

This Court Should Grant a Writ of Certiorari To Decide Whether 11 U.S.C. §547(c)(2) As Amended by the 1984 Amendments Should Apply In This Case.

The following facts were stipulated to at trial:

(a) the alleged preferential payment was of a debt incurred by the debtor in the ordinary course of business or financial affairs of both the debtor and the transferee/defendant;

(b) such payment was made in the ordinary course of business or financial affairs of the debtor and the transferee/defendant; and

(c) that such payment was made according to ordinary business terms.

Section 547(c)(2) provides the "ordinary course of business" defense to a preference action if the transfer in question is:

(a) in payment of a debt incurred by the debtor in the ordinary course

> of business or financial affairs of the debtor and the transferee;
>
> (b) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (c) made according to ordinary business terms.

11 U.S.C. §547(c)(2).

Prior to the 1984 Amendments, 11 U.S.C. §547(c)(2) contained a fourth requirement that the transfer must have been "made not later than 45 days after such debt was incurred...." The 45-day restriction was deleted by section 462(c) of the 1984 Amendments.

Each of the bankruptcy cases out of which these preference cases arise was filed in September, 1984. Each preference

case here on appeal was filed in October, 1985.

The date of enactment of the 1984 Amendments was July 10, 1984. Section 553(a) of the 1984 Amendments provides:

> Except as otherwise provided in this Section the amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act.

(Emphasis added.) As a consequence, the effective date of this Act is October 8, 1984. Each preference case was filed more than one year after the date of enactment.

In denying Petitioners' section 547(c)(2) defense, the Tenth Circuit adopted a restricted, exclusive meaning of the work "case" appearing in section 553(a) of the 1984 Amendments, as meaning only the bankruptcy case. Such a restrictive reading is contrary to the

ruling of several circuit courts of appeal and the clear intent of Congress.

On a larger scale, the issue of which form of the law applies turns on the intent of Congress, and the remedial nature of the changes Congress adopted in 1984. This case may serve as one of the more egregious examples of why Congress deleted the 45-day requirement to the ordinary course of business exception. As the debate on the Senate floor points out the problems caused by this exception in the commercial arena,[3] this case points out the tragic consequences visited on ordinary people, many of whom are at or nearing retirement age, by such a re-

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3 See, 130 Cong. Rec. S8897 (daily ed. June 29, 1984) (statements of Sen. Dole and Sen. DeConcini), and S. Rep. No. 65, 98th Cong. 1st Sess. 60 (1983).

quirement. People who did nothing more than redeem certificates of deposit on their maturity date are sued over a year after the withdrawal took place and told they have to return their savings to a trustee they have never heard of, for a reason they cannot understand, and in many cases, after the money has gone to pay hospital bills, pay off mortgages, or pay for a child's education. This problem is specifically the type of problem Congress sought to remedy with the passage of the 1984 Amendments. Other circuits have recognized that fact.

Congress enacted these changes on July 10, 1984, and made the applicable section of the 1984 Amendments "effective to cases filed 90 days after July 10, 1984, or October 9, 1984." In re Harbour, 840 F.2d 1165, 1167, n.3 (4th Cir. 1988)

(emphasis by the court; citations omitted.) As the Fourth Circuit goes on to state in the Harbour case "[h]ere, although the petition was filed in February 1982, the trustee's complaint was filed October 12, 1984." Id. The Fourth Circuit therefore applied the new law.

Just like the situation in Harbour, the bankruptcy petition in this bankruptcy case was filed days before the effective date of this section of the 1984 Amendments. The preference complaints were filed almost one year after the effective date of those amendments. The Court below expresses a belief that Congress meant the term case to mean the bankruptcy case, and not the more generally accepted reference to the myriad of litigation matters that exist in the world, many of which are spawned by the filing of a bankruptcy

petition. The Tenth Circuit notes that without this restricted reading, different people would be treated differently in the same bankruptcy case. This is true, but only for the ninety days between July 10 and October 8, 1984. After that date, the remedy intended by Congress would be in effect for all.

The Court below ignores the fact that Congress intended to change the law. The amendments were made to effect a remedial purpose. Congress accomplished this in as fair a way as possible. Upon enactment, Congress gave bankruptcy trustees ninety days in which to initiate action under the old law, so as to permit the continuity of treatment previously started in a given case. However, Congress gave them only ninety days. After that grace period, the new law went into effect. Congress

intended to change the law in 1984, not create a situation where the courts would be continuing to litigate these matters five years later.

This can be seen by the way Congress used the term case in Section 553(a) of the 1984 Amendments. A careful, methodical reading of the 1984 Amendments clearly points out that each and every time Congress refers to the bankruptcy case, it uses the term "bankruptcy case," "case under Title 11" or some such specific modifier. It is only in section 553(a) of the Amendments that Congress uses the term case without the modifier. This is because the changes effected by Title III of the Amendments effect all kinds of cases, not just the bankruptcy case. One only recognizes this distinction when the entire text of the 1984 Amendments is

read. This is the same conclusion reached in the decisions cited above rendered by the Third, Fourth, Sixth, Seventh, and Eleventh Circuits with little or no comment. In the bankruptcy court decision of In re Brenton's Cove Development Corp., 52 Bankr. 287 (Bankr. D. R.I. 1985), Bankruptcy Judge Votolato expressly states that the amended law was to be applied and the 45 day rule had been eliminated. Id. at 292, n.7. In the context of another aspect of the decision, the Court notes:

> [t]here was a time when this Court was receptive to, and in fact quite susceptible to such arguments, but after a period of appeals and abrupt reversals, we have learned (hopefully) to read and apply plain English just as it is written.

Id. at 291. It is the application of plain English that Petitioners have urged

this Court, and the courts below, to consider and apply.

Petitioners request of this Court to grant a writ of certiorari, and provide them the relief Congress intended they be accorded as evidenced by the plain language of the statute, and recognized by several circuits that conflict with the opinion rendered by the Tenth Circuit below.

Petitioners are Creditors of the Estates Who Did Not Receive Notice and an Opportunity to be Heard in the Confirmation Process of the Plans of Reorganization and Consequently have Unimpaired Offsetting Claims to Any Funds Disgorged to Respondent and Should Be Allowed to Assert Such Claims in the Preference Actions.

11 U.S.C. §502(h) provides for the allowance, or disallowance, of claims arising from recovery of property under 11 U.S.C. §550(a) (i.e., a preference creditor), as if the claim had arisen before

the date of bankruptcy. It is 11 U.S.C. §550, under Respondent's theory, that provides for recovery (or affirmative judgment) against Petitioners upon entry of judgments.

Title 11 U.S.C. §101(4)(A) defines "claim" as: "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. (Emphasis added.) Petitioners' claims clearly fall within this broad definition.

Additionally, Title 11 U.S.C. §101(9)(B) includes within the definition of "creditor" an "entity" that has a claim against the estate of a kind

specified in section 502(h) of this title [Title 11 U.S.C.]." (i.e., a preference creditor.)

This short walk through the Code indicates that Petitioners are creditors of the respective estates, and that their claims are to be treated as pre-petition claims.

Bankruptcy Rule 2002(b) provides that notices must be given to all creditors of various confirmation information. Bankruptcy Rule 3017(d) mandates transmittal to all creditors by mail of the plan and related material.

Petitioners were known to the Trustee to be a creditor at the time the plans of reorganization were proposed. During this process Petitioners were not provided any of the notices required.

The plans, confirmed on March 21, 1986, provide that upon confirmation, all property of the estate shall be free and clear of all claims of creditors. However, the failure to provide Petitioners, as creditors, the required notices clearly constitutes a denial of due process and Depositors' claims are not bound by the plans. New York v. New York, New Haven and Hartford R.R. Co., 344 U.S. 293, 297, (1953); Reliable Electric Co. v. Olson Construction Co., 726 F.2d at 620 (10th Cir. 1984); see also, Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Broomall Industries, Inc. v. Data Design

Logic Systems, Inc., 786 F.2d 401 (Fed. Cir. 1986); In re Intaco Puerto Rico, Inc., 494 F.2d 94, 99 (1st Cir. 1974); In re Harbor Tank Storage Co., Inc., 385 F.2d 111, 115 (3d Cir. 1967). Each of these cases articulates principles that are fundamental to our legal system. The law cannot be more clear. As a result of the denial of due process, Petitioners' claims survive confirmation of the plan unimpaired. The only remedy now available to correct these errors, which constitute blatant denial of due process, is that which Petitioners urge. As the Reliable court noted:

> A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. Specifically, the reorganization process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so that they may have the

> opportunity to protect their interests. We will not require Olson to subject its claim to a confirmed reorganization plan that it had no opportunity to dispute.

Reliable Electric Co., 726 F.2d at 623 (citations omitted). Here Petitioners and Respondent each hold mutual claims against the other. But, unlike the circumstances of New York, New Haven or Reliable, Petitioners claims, which become fixed and liquidated in the event of judgments against them, will not exceed the amount of the judgments. These claims, however, which are not bound to the plans and which are equal to the Respondent's preference claims are, under the reasoning of New York, New Haven, entitled to payment in full. The relationship and results may be termed a "net wash" and is the basis for

the asserted counterclaim in the nature of setoff which has been wrongly denied Petitioners.

It is clear from Rule 7(a) and Rule 12(b) of the Federal Rules of Civil Procedure (applicable here by Bankruptcy Pules 7007 and 7012) that a counterclaim is properly pled as a defense though not specifically denominated as a counterclaim. Moreover, since this counterclaim is one which arises out of the subject matter of the preference complaint, this counterclaim may well be compulsory under Rule 13, Fed. R. Civ. P., which, if not asserted, is waived U.S. v. Ingalls, 399 F.2d 143 (5th Cir. 1968) (setoffs must be pleaded).

Regardless of the merits of Respondent's preference claims, Petitioners hold claims that are unimpaired by the plans,

and Respondent should recover nothing as a result of these offsetting claims. The Tenth Circuit refused to recognize these claims and in so doing has denied Petitioners their most fundamental rights, rendered an opinion that is in conflict with a long line of decisions issued by this Court, and raised an important question of federal law which should be settled by the Court. Consequently, this Court should grant Petitioners' request for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPUBLIC TRUST & SAVINGS, d/b/a Western Trust and Savings Company,	)
Debtor.	)
R. DOBIE LANGENKAMP, Successor Trustee,	)
Appelle,	)
vs.	)
P.A. HACKLER; DELORES HACKLER; C.A. CULP, JULIA CULP; CULP DISTRIBUTING COMPANY; KENNETH D. Moore; MARY L. MOORE; KEMEL SAIED; CONSTANCE G. SAIED; HATTIE LOU GESIN; LEROY DENNIS; JANET DENNIS,	)
Appellants.	)

ORDER

Filed April 10, 1989

Before Honorable William J. Holloway, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable

Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, and Honorable Dale E. Saffels*, District Judge.

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*The Honorable Dale E, Saffels, United States District Judge for the District of Kansas, sitting by designation,

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This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc and appellee's petition for rehearing in the captioned case.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decisions.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on

the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Seymour did not participate.

Entered for the Court

ROBERT L. HOECKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: REPUBLIC TRUST & SAVINGS COMPANY, doing business as Western Trust & Savings Company; and REPUBLIC FINANCIAL CORPORATION, an Oklahoma Corporation,	)	
Debtors.	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
Appellee,	)	No. 88-2182
vs.	)	
P.A. HACKLER; DELORES HACKLER; C.A. CULP; JULIA CULP; CULP DISTRIBUTING COMPANY; KENNETH D. MOORE; MARY L. MOORE; KEMAL SAIED; CONSTANCE G. SAIED; HATTIE LOU GESIN; LEROY DENNIS; and JANET DENNIS,	)	
Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 87-C-616-C)
(consolidated)

John J. Carwile (Sam G. Bratton II and Richard H. Foster with him on the brief), of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma, for Appellee.

Tony W. Haynie (William E. Rutledge and Deirdre O. Dexter with him on the brief), of Conner & Winters, Tulsa, Oklahoma, for Appellants.

Before LOGAN and BALDOCK, Circuit Judges and SAFFELS, District Judge.*

BALDOCK, Circuit Judge.

The debtors, Republic Trust & Savings Company and Republic Financial Corporation, were uninsured financial institutions doing business in Oklahoma. Appellants were holders of thrift and passbook savings certificates issued by the debtors

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* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

to represent the debtors' promise to repay monies the appellants had invested in them. Between July 5 and September 19, 1984, appellants redeemed their certificates and accepted payments from the debtors aggregating over $713,919. On September 24, 1984, the debtors filed a chapter eleven bankruptcy petition. In October 1985, the bankruptcy trustee instituted adversary proceedings against the appellants seeking to recover the payments as avoidable preferences under 11 U.S.C. § 547(b).[1] At the conclusion of a

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[1] Subsection (b) reads in pertinent part:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(Footnote Continued)

four-day bench trial in June 1987, the bankruptcy court found that the monies appellants received from the debtors within ninety days of the petition's

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(Footnote Continued)

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made--
> (A) on or within 90 days before the date of the filing of the petition;
> . . .
> (5) that enables such creditor to receive more than such creditor would receive if--
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

filing constituted avoidable preferences. The district court affirmed the bankruptcy court's judgment. Appellants take exception, asserting that they were entitled (1) to judgment as a matter of law because the exemptions contained in 11 U.S.C. § 547(c)(1) & (2) negated the trustees avoidance powers, (2) to offset the debtors' payments against the preferential transfers because they were denied due process in connection with the confirmation of the reorganization plans, or (3) to a jury trial. Our jurisdiction over this appeal arises pursuant to 28 U.S.C. § 158(d). We review these questions of law de novo, and reverse.

I.

Under 11 U.S.C. § 547(c)(1), a bankruptcy trustee may not avoid a

transfer which meets the requirements of subsection (b)

> to the extent that such transfer was-- (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

(emphasis added). Section 547(a)(2) defines new value as "money or money's worth in goods, services, or new credit ...." According to appellants, their redemption of thrift and passbook savings certificates in exchange for the debtors' payments constituted a "contemporaneous exchange for new value," because the certificates had "independent value."

In Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772 (10th Cir.), petition for cert. filed, ___ S. Ct. ___ (1989), we recently addressed the nature

of thrift and passbook savings certificates in determining that the instruments issued by the debtors were "securities for the purposes of the federal securities laws." Id. at 788. We stated:

> [B]oth the passbook savings certificates and thrift certificates are essentially debt instruments, representing a promise by the issuing entity to repay the principal amount, plus accrued interest at a specified rate, within a specified time period or on demand. These instruments will therefore be analyzed under the "notes" or "evidence of indebtedness" categories of the statutory definition of "security" [contained in 15 U.S.C. § 78c(a)(10)].

Id. at 777.

Given our description in Holloway of the thrift and passbook savings certificates at issue here as "debt instruments, representing a promise by the issuing entity to repay," we conclude that appellants' redemption of the certificates in

exchange for the debtors' payments did not constitute new value within the meaning of § 547(c)(1). The certificates were nothing more than evidence of an underlying indebtedness, akin to promissory notes, owed by the debtors to the appellants as holders of the certificates. Appellants ask us essentially to hold that a creditor's transfer of a note upon receipt of a debtor's final payment constitutes a contemporaneous exchange for new value. Because no authority exists to support such a proposition, we decline the invitation.[2] The district court did not

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2 Appellants' reliance on In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986), is misplaced. In Rodman, the debtor transferred $238,842 to the creditor in exchange for the release of an oil well lien in the same amount. Because the creditor released a lien equivalent to

(Footnote Continued)

err in declining to grant appellants judgment as a matter of law under § 547(c)(1).

II.

The district court's conclusion that appellants were not entitled to judgment under § 547(c)(2) was likewise correct. Prior to the 1984 amendments to the bankruptcy code, Pub. L. No. 98-353, 98 Stat. 333, subsection (c)(2) prohibited a bankruptcy trustee from avoiding a preferential transfer if the transfer was

> (A) in payment of a debt incurred by the debtor in the

(Footnote Continued)

the amount of the debtor's transfer, the creditor was entitled to the § 547(c)(I) defense. Unlike the lien in Rodman, the certificates in this case do not constitute property susceptible of exchange for the purpose of § 547(c)(I), but rather, only evidence of an indebtedness owed appellants.

> ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made not later than 45 days after such debt was incurred;
> (C) made in the ordinary course of business or financial affairs of the debtor and transferee; and
> (D) made according to ordinary business terms.

11 U.S.C. § 547(c)(2) (amended 1984). The bankruptcy trustee acknowledges that the debtors' payments to appellants comply with the requirements of subsections (A), (C) & (D), while the appellants admit that the payments were not made within 45 days after the debt was incurred as required by subsection (B). Appellants contend, however, that the 45-day rule is inapplicable because the 1984 amendments abolished it. Pub. L. No. 98-353, § 462(c), 98 Stat. 378. Thus, we must determine whether the pre- or post-amendment version of § 547(c)(2) applies in this instance.

The effective date of the bankruptcy amendments is contained in Pub. L. No. 98-353, § 553, 98 Stat. 392: "[T]he amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act." (emphasis added). The amendments were enacted on July 10, 1984, and became effective on October 8, 1984. Because the bankruptcy trustee did not institute adversary proceedings against the appellants until October 1985, a year after the amendments effective date, appellants claim the post-amendment version of § 547(c)(2) applies. The trustee asserts, however, that because the debtors filed their bankruptcy petition on September 24, 1984, before the amendments became effective, the pre-amendment version of subsection

(c)(2) governs and the 45-day rule bars appellants' defense.

The problem with appellants' position is that it equates the word "cases" appearing in § 553 with the term "proceedings." Preference actions are generally described as proceedings, see, e.g., Bankr. R. 7001, whereas a case commences with the filing of a bankruptcy petition, see e.g., 11 U.S.C. §§ 301-03. See generally, S. Rep. No. 989, 95th Cong., 2d Sess. 153-54, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5939-40 (Senate Report to Bankruptcy Reform Act of 1978). Lower courts have consistently recognized this difference in applying the pre-amendment version of § 547(c)(2). In re Amarex, Inc., 74 B.R. 378, 381-82 (Bankr. W.D. Okla. 1987), aff'd, 88 B.R. 362, 364 (W.D. Okla. 1988) (reference to "cases" in

§ 553 refers to bankruptcy cases, not adversary proceedings).

Although no circuit court has squarely addressed the meaning of the word "cases" in § 553, in Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1175 n.2 (10th Cir. 1989), we recently endorsed the view that "cases" refers to bankruptcy cases rather than adversary proceedings: "This amendment [elimination of 45-day rule in § 547(c)(2)] applies to bankruptcy cases filed after October 8, 1984." (emphasis added). To support our statement, we cited In re Sounds Distrib., Inc., 80 B.R. 749, 751-52 (Bankr. W.D. Pa. 1987), which held that the controlling date in determining the applicability of the 1984 amendments was the date the debtors filed their bankruptcy petition rather than the date the trustee commenced

adversary proceedings. See also In re Bullion Reserve, 836 F.2d 1214, 1217 n.2 (9th Cir.), cert. denied, 108 S. Ct. 2824 (1988) (amendment to § 547(c)(2) did not apply because debtor filed its bankruptcy petition in 1983); In re Energy Co-op Inc., 832 F.2d 997, 1000 n.2 (7th Cir. 1987) (45-day requirement applied because § 547(c)(2) amendment applicable only to "bankruptcy cases' filed 90 days after July 10, 1984). Were we to accept appellants' interpretation of the word "cases" in § 553, different legal standards might apply in the same bankruptcy case due to a trustee's decision to commence adversary proceedings on separate dates. This surely was not the intent of Congress in amending the bankruptcy code. The district court properly applied the 45-day rule contained in the pre-amendment

version of § 547(c) (2) in rejecting appellants' claimed exemption.

III.

The district court also properly rejected appellants' assertion that they were denied due process of law when they failed to receive notice of the time fixed for objecting to the debtors' proposed reorganization plans. The fifth amendment, U.S. Const. amend V, requires that creditors holding claims against a bankruptcy estate must be given reasonable notice of a plan's confirmation hearing before their claims are barred. City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953) (reasonable opportunity to be heard must precede judicial denial of creditor's claimed rights); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620, 622-23

(10th Cir. 1984) (reorganization process requires that creditors be properly notified of steps in the proceeding so they may have an opportunity to protect their property interests). Consistent with this constitutional mandate, Bankruptcy Rule 2002 provides that "all creditors" shall be given at least twenty-five days written notice of "the time fixed for filing objections to and the hearing to consider confirmation of a plan." See Sheftelman v. Standard Metals Corp., 839 F.2d 1383, 1386 (10th Cir. 1987), cert. dismissed, 109 S. Ct. 201 (1988) (actual notice to known creditors required under Bankr. R. 2002).[3]

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[3] Unlike the other appellants, C.A. Culp, Julia Culp, Culp Distributing Company, (Footnote Continued)

Appellants, however, are not "creditors" entitled to notice within the purview of Rule 2002. A creditor is defined in 11 U.S.C. § 101(9) as an "entity that has a claim against the

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(Footnote Continued)

Leroy Dennis and Janet Dennis apparently continued to have monies invested in the debtors at the time of the bankruptcy, and thus filed proof of claims with the bankruptcy court. Although these appellants as scheduled creditors received the requisite notices, their claims were properly disallowed under 11 U.S.C. § 502(d) for purposes of voting on the plans because they had not returned the transfers which the trustee sought to avoid as preferences. Section 502(d) provides in relevant part: "[T]he court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable . . . ."

debtor that arose at the time of or before the order for relief concerning the debtor." Claim is defined in turn as a "right to payment." Id. § 101(4). Appellants do not have even a contingent right to payment from the debtors' estates at this point; rather, as defendants in the trustee's adversary proceedings, they may have an obligation or liability to pay the estates the monies transferred to them by the debtors. Until the adversary proceedings are finally adjudicated, the trustee has a claim against the appellants for payment; appellants have a potential duty to pay. Appellants will have a claim against the estates only if the trustee prevails in the adversary proceedings and successfully avoids the debtors' transfers

to appellants as preferences under 11 U.S.C. § 547.[4]

Thus, appellants have been afforded all the fifth amendment protection to which they are entitled. The fifth amendment dictates that the federal government may not deprive individuals of property without first affording them due process of law. Any deprivation of property will occur in the trustee's proceedings to avoid the allegedly

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[4] The trustee correctly points out that appellants cannot possibly become creditors of the estates until after the conclusion of the adversary proceedings against them. Otherwise, a transferee who has a valid defense to a preference action and ultimately no liability to the estate would be permitted to vote on and object to a plan of reorganization without ever having any interest in the estate. Thus, appellants' argument is nonsensical. Appellee's Brief at 40.

preferential transfers. Appellants have received ample notice and opportunity to be heard in these adversary proceedings. This appeal is in fact an exercise of appellants' right to be heard. Any claims the appellants have against the debtors' estates will arise only if and after the trustee deprives them of property.[5]

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5 Appellants' citation to Reliable Electric, 726 F.2d at 620, is inapposite. In that case, a construction company had a prepetition claim for breach of contract against the debtor that arose prior to confirmation of the plan. Because the company had not received formal notice of the bankruptcy proceedings, the court refused to discharge the company's claim against the debtor. In contrast, appellants present no claim arising before confirmation of the plan. A claim will arise only if the trustee recovers a judgment against appellants for a preferential transfer. See In re Southern Indus. Banking Corp., 88 B.R. 174, 176-77 (Bankr. E.D. Tenn. 1987).

IV.

Lastly, appellants contend the district court violated the seventh amendment by denying them a jury trial on the bankruptcy trustee's preference claims. In Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2787 (1989), the Supreme Court recently held that a "person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer." The Court found indistinguishable its earlier decision in Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), which held that a trustee's action to avoid allegedly preferential transfers was legal rather than equitable. Granfinanciera, 109 S. Ct. at 2793-94.

The Court distinguished its decision in Katchen v. Landy, 382 U.S. 323 (1966). Katchen held that no right to a jury trial existed where a trustee's counterclaim against a claimant of the estate alleged that the payments the claimant sought to recover were avoidable preferences. In other words, because the preference issue arose "as part of the process of allowance and disallowance of claims, it [was] triable in equity." Id. at 336. Granfinanciera explained: "Our decision [in Katchen] turned on the bankruptcy court's having actual or constructive possession of the bankruptcy estate, and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate." 109 S. Ct. at 2798. The Court noted that the claimant in Katchen "would

have been entitled to a jury trial if the trustee had brought a plenary action in federal court." Id.

Under Granfinanciera, those appellants that did not have or file claims against the debtors' estates undoubtedly are entitled to a jury trial on the issue of whether the payments they received from the debtors within ninety days of the latter's bankruptcy constitute avoidable preferences. Although some of the appellants did file claims against the estates because they continued to have monies invested in the debtors at the time of bankruptcy, see supra a note 3, we believe they likewise are entitled to a jury trial under the rationale of Granfinaciera and Katchen. Despite these appellants' claims, the trustee's actions to avoid the transfers, consolidated by the bankruptcy

court, were plenary rather than a part of the bankruptcy court's summary proceedings involving the "process of allowance and disallowance of claims."

Accordingly, the judgment of the district court is REVERSED and this cause REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation, Debtor.	
P. A. HACKLER and DELORES HACKLER, KENNETH D. and MARY L. MOORE, and KEMAL SAIED and CONSTANCE SAIED, Appellants, vs. R. DOBIE LANGENKAMP, Successor Trustee, Appellee.	No. 87-C-616-C No. 87-C-618-C No. 87-C-619-C
REPUBLIC TRUST & SAVINGS, d/b/a Western Trust and Savings Company, Debtor.	
C. A. CULP, JULIA CULP, and CULP DISTRIBUTING COMPANY; HATTIE LOU GESIN; and LEROY DENNIS and JANET DENNIS,	No. 87-C-617-C No. 87-C-620-C No. 87-C-692-C

Appellants,	)	
	)	
vs.	)	
	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	(Consolidated Under No. 87-C-616-C
	)	
Appellee.	)	

ORDER

Now before the Court for its consideration are the consolidated appeals filed by appellants P. A. Hackler and Delores Hackler, C. A. Culp, Julia Culp and Culp Distributing Company, Kenneth D. and Mary L. Moore, Kemal Saied and Constance Saied, Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee based on a

finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. § 547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation, on June 1-5, 1987.

The appellants raise five separate arguments on appeal, which shall be addressed in turn.

I.

Initially, the appellants contend that they were improperly denied a jury trial in the proceedings below. The United States Court of Appeals for the Tenth Circuit has previously addressed this issue, stating:

> [t]he right to a jury trial in bankruptcy proceedings is purely statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature.

In re Beery, 680 F.2d 705, 710 (10th Cir.) cert. denied, 459 U.S. 1037 (19821 (citing Katchen v. Landy, 382 U.S. 323 (1966)). However, inasmuch as the Beery decision was not rendered under the presently applicable 1984 Bankruptcy Amendments and Federal Judgeship Act, this Court will address the issue in view of recent authority.

The relevant statutory provision is 28 U.S.C. § 1411(a) which provides that the bankruptcy statutes do not affect the right of trial by jury that one may have regarding a personal injury or wrongful death tort claim. Appellants do not contend that the preference actions in question fall within this provision, and

therefore effectively concede that there is at present no statutory right to jury trial available to them. The appellants contend, however, that the Seventh Amendment to the United States Constitution provides a right to a jury trial even within the bankruptcy universe. The decision in Beery, supra did not specifically address the issue of jury trials in preference actions. There presently exists conflicting authority on the issue.

One view is that when a preference action seeks only monetary damages, it constitutes what has traditionally been characterized as an action at law, as opposed to an equitable cause of action. Under the Seventh Amendment, one is entitled to a jury trial in an action at law. See Ross v. Bernhard, 396 U.S. 531 (1970). The other view is that all

bankruptcy proceedings are inherently equitable, and that thus no jury trial right exists. The 1984 Amendments divide bankruptcy jurisdiction into "core" and "non-core" proceedings. Proceedings dealing with preferences and fraudulent conveyances are denominated as "core" proceedings pursuant to 28 U.S.C. § 157(b)(2)(F) and 28 U.S.C. § 157(b)(2)(H), respectively. In essence, courts who take this view hold that even a traditional legal action, by being termed a core proceeding, undergoes a conversion into an equitable proceeding to which the right to jury trial does not attach. The two views are summarized in In re Adams, Browning & Bates, Ltd., 70 B.R. 490 (Bankr. E.D.N.Y. 19871.

Upon review, this Court finds that the greater weight of support in existing

authority favors the second view. In Katchen v. Landy, 382 U.S. 323 (1966), the Supreme Court stated:

> "So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery-methods."

Id. at 337 (quoting Barton v. Barbour, 104 U.S. (14 Otto) 126, 134 (1881)) (emphasis added). The Court also noted:

> The Bankruptcy Act, passed pursuant to the power given to Congress by Art.I, §8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the res.

Id. at 336 (emphasis added). This Court is aware of Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), which contains the statement that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." Id. at 94-95. In Katchen v. Landy, the Supreme Court cited Schoenthal for the proposition that a creditor "might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding". Katchen, 382 U.S. at 336, (i.e., by making a claim, one submitted oneself to the bankruptcy court's jurisdiction under the old summary/plenary jurisdiction dichotomy.) This issue has been resolved, in those decisions which this Court views as better reasoned, by concluding that Congress has made the

decision to name preference actions as "core" proceedings, thus performing the constitutional conversion from legal claim to equitable proceeding approved in Katchen. See In re Harbour, 840 F.2d 1165, 1178 (4th Cir. 1988) (core proceeding assumes historical equitable posture of all such bankruptcy proceedings); In re Chase & Sanborn Corp., 835 F.2d 1341, 1349 (11th Cir. 1988) (core proceeding is inherently equitable in nature) In re Southern Industrial Banking Corp. 66 B.R. 370, 374-75 (Bankr. E.D.Tenn.) (statement in Schoenthal that preference actions are not part of bankruptcy proceedings, "is no longer true and there is implicit congressional intent that preference actions be tried without a jury"). This Court has concluded that the appellants had no constitutional right to jury trial in

these actions, and that the judgments should not be reversed on that basis.

II

In 1984, Congress amended Title 11 of the United States Code by enacting the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Act). Section 553(a) of the 1984 Act provides:

> Except as otherwise provided in this Section the amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act.

(emphasis added). The date of enactment was July 10, 1984. The ninetieth day after this date -- October 8, 1984 -- was a holiday; therefore, the effective date of the amendments was October 9, 1984. The pre-1984 Act version of 11 U.S.C. §547(c)(2) provided as follows:

> (c) The trustee may not avoid under this section [§547] a transfer --

> (2) to the extent that such transfer was --
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made not later than 45 days after such debt was incurred;
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c)(2)(A), (C) and (D). However, the 1984 Act repealed §547(c)(2)(B) thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy

petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

> Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.
>
> It is apparent from a review of the 1984 Act that the two terms are used with precision in many other

> provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". Nicholson v. First Investment Co., 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in §547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes

that the 45-day rule applies, as the lower court found.

III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. §502(h).

The appellants place principal reliance upon Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984). In Reliable, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the

confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the Reliable decision, was presented to the court in In re Southern Indus. Banking Corp., 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

> [the claim at issue in Reliable differs] materially from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.
>
> "Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S.Code Cong. & Adm.News

5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." Id. However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos-related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." In re UNR Industries, Inc., 29 B.R. 741, 745 (N.D.Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984)

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the

> Bankruptcy Rules Committee envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h) are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from them pursuant to §550. See §502(h) (a claim arising <u>from the recovery or property</u> under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

<u>Id</u>. at 361. (footnote omitted). This Court agrees with the analysis above. The recent decision of <u>Sheftelman v. Metals Corp.</u>, 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, <u>Sheftelman</u> did not involve preference defendants, but bondholders who held existing pre-petition

claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. Cf. In re Amarex, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the

transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5) the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made; and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been

insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350 (8th Cir. 1983). See also In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987).

> A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) cert. denied, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.
>
> . . .
>
> Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. See, e.g., In re Kaylor Equip. and Rental, Inc., 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily

balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon In re Tenna Corp., 801 F.2d 819 (6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of

the estate, (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of Tenna upon the necessity of creating a hypothetical Chapter 7 model. Actually, the Tenna court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." Tenna, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate time for testing the preferential effect of a payment." Id. at 820 (emphasis added). The issue was critical in Tenna because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. Id.

The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

> In the case under review, the bankruptcy court found
>
> that the evidence establishing the debtor's insolvency <u>on the date of the filing of the bankruptcy petition</u> is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5)

determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

> (c) The trustee may not avoid under this section a transfer--
>
> (1) to the extent that such transfer was
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to

> be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange;

With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

> (2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

Payment of long-term debt does not fall within this exception. See, e.g., In re Candor Diamond Corp., 44 B.R. 195 (Bankr. S.D.N.Y. 1984). The defendants' citation

of In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) is inapposite. In Rodman the court held that a release of a materialman's lien upon an oil well in response to payment of a debt constituted "new value." The court specifically noted that Oklahoma law defines a lien as a property right. Id. at 128 n.7. Thrift certificates do not constitute property interests, but rather are evidence of underlying indebtedness. Accordingly, this argument is rejected.

It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30th day of June, 1988.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re	)	
	)	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	)	Bankruptcy Case No. 84-01460 Chapter 11
	)	
Debtor.	)	
	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
	)	
Plaintiff,	)	Adversary No. 85-0305
	)	
vs.	)	
	)	
P.A. HACKLER and DELORES HACKLER,	)	
	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendants.	)	

This matter came on for trial before the Court on June 1, 1987. The plaintiff was represented by Sam G. Bratton, II, John J. Carwile, and Richard H. Foster, of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma; the defendants were represented by Ernest A. Bedford and

Eric W. Spooner, of Bedford & Associates, Inc., Tulsa, Oklahoma. Trial was concluded on June 5, 1987, at which time the Court took this matter under advisement.

The Court, now having duly considered the evidence presented to it, together with the memoranda and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is the successor trustee of the estate of Republic Financial Corporation ("RFC"), the debtor in the above-captioned bankruptcy proceeding.

2. This Chapter 11 bankruptcy proceeding was commenced on September 24, 1984.

3. Jack D. Jones was appointed trustee in the case on October 31, 1984.

4. R. Dobie Langenkamp was appointed successor trustee in the case on May 9, 1986, effective May 16, 1986.

5. RFC was an uninsured financial institution, principally engaged in the business of issuing evidence of debt and the making of commercial and personal loans, both secured and unsecured.

6. On or about April 21, 1981 in exchange for cash consideration from the defendants, RFC issued to the defendants that certain passbook account certificate number 7006023. The Hacklers subsequently transferred funds to RFC under passbook account certificate number 7006023, to the extent that as of September 19, 1984, the balance owing from RFC to the Hacklers on that date was $26,465.03.

7. During the 90-day period immediately preceding the date of the filing

of the bankruptcy petition herein, RFC made the following transfer of its property to or for the benefit of the defendants (hereinafter "the transfer"), to-wit:

DATE	AMOUNT
September 19, 1984	$26,465.03

8. The foregoing transfer was made through RFC check number 47052, in the amount of $26,465.03, which the defendants received and defendant Delores Hackler endorsed.

9. The principal asset of RFC was its loan portfolio.

10. The liabilities of RFC consisted primarily of its obligations to purchasers of its thrift certificates and passbook thrift certificates.

11. RFC was primarily a collateral lender.

12. Prior to September 24, 1984, RFC routinely engaged in unsafe and unsound lending practices. These practices included:

(a) RFC did not properly evaluate loan requests in terms of credit history, character, capacity to repay, collateral value, or adequacy of capital or net worth;

(b) RFC did not evaluate loan requests with respect to the effects of worsening economic conditions;

(c) RFC and its borrowers did not agree upon a loan repayment program at the time of loan origination;

(d) RFC made loans that did not provide for periodic payments;

(e) RFC made and reviewed loans without adequate collateral appraisals or title searches;

(f) RFC deferred and extended loans without full payment of interest and reduction of principal;

(g) RFC made an inordinate number of loans to officers and directors, their relatives and other corporations or entities controlled by them, wholly without adequate security for the loans or other reasonable prospects for repayment;

(h) RFC failed to recognize or establish adequate loan loss reserves against nonperforming or poor quality loans;

(i) RFC intentionally misrepresented the quality or character of nonperforming or low quality loans

and took affirmative actions to disguise the true quality of such loans.

13. On June 29, 1984, through a corporate reorganization referred to as "the divestiture," ownership of RFC was transferred from its parent corporation, Republic Bancorporation, Inc. ("Old RBI") to a newly formed parent corporation, also known as Republic-bancorporation, Inc. ("New RBI"). Prior to the divestiture, Old RBI was indebted to RFC in the amount of $1.5 million. In the divestiture transaction, this debt was transferred to New RBI. As a result of the divestiture, RFC encountered significant and devastating liquidity problems, and the divestiture seriously impaired RFC's ability to raise capital.

14. The general ledger balance sheets for RFC show a $1.5 million to either Old RBI or New RBI as an asset on every day from June 25, 1984 to September 24, 1984.

15. On the date of the transfer at issue and at all times during the 90-day period immediately preceding the filing of the bankruptcy petition New RBI was completely unable to repay the $1.5 million loan, and the fair value of this loan was zero.

16. The debtor's schedules list property totaling $21,604,279.67 and debts of $25,196,162.30, as of September 24, 1984, the date of the filing of RFC's petition.

17. Harold J. Madigan, an independent loan portfolio expert, rendered an opinion that on June 25, 1984, 52 loans in

RFC's loan portfolio were overvalued in the amount of at least $11,914,917.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in the amount of the overvaluation would render RFC insolvent on June 25, 1984.

18. Touche, Ross & Co. was retained by the trustee to perform a comprehensive investigation and analysis of RFC's affairs and condition. Richard Spillers on behalf of Touche, Ross & Co. rendered an opinion that on June 25, 1984, RFC's assets were overvalued in the amount of at least $8,001,000.00. Spillers further rendered an opinion that a write-down or reserve against the assets of RFC in the amount of the overvaluation would render RFC insolvent on June 25, 1984.

19. Harold J. Madigan, an independent loan portfolio expert, also rendered an opinion that on September 24, 1984, 30 loans in RFC's loan portfolio were overvalued in the amount of at least $12,040,413.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in this amount would render RFC insolvent on September 24, 1984.

20. Touche, Ross & Co. reviewed the debtor's financial statements for each of the 90 days next preceding the filing of the debtor's petition and was of the opinion that RFC was insolvent on each such date.

21. There were no developments from June 25, 1984 to September 24, 1984 that improved the financial condition of RFC.

22. The affirmative evidence offered by defendants to support a claim of solvency consisted of the testimony of Ansil L. Ludwick, former president of RFC, the testimony of Paul Anderson, former vice chairman of RFC, and the unaudited daily general ledger balance sheets for RFC prepared during the 90-day period prior to bankruptcy.

23. From June 25, 1984 to September 24, 1984 the loan portfolio asset values shown on the RFC general ledger balance sheets were significantly overstated.

24. The Court finds the daily general ledger balance sheets to be unreliable evidence of RFC's financial

condition or its asset value from June 25, 1984 to September 24, 1984.

25. The Court finds that the testimony of Ansil L. Ludwick and Paul Anderson that RFC was solvent from June 25, 1984 to September 24, 1984 is not credible and is contradicted by the evidence introduced by the plaintiff.

26. The RFC estate's lawsuit against Aetna Casualty and Surety Company ("Aetna") is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RFC estate's debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b) (3) and the test for greater

recovery under § 547(b) (5), the Court finds the value of this asset to be zero.

27. The RFC estate's lawsuit against Peat, Marwick, Mitchell & Co. is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RFC estate 5 debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b) (3) and the test for greater recovery under § 547(b) (5) the Court finds the value of this asset to be zero.

28. There is no evidence of the existence of any claims or causes of action, other than collections, that could be rendered available for payment of the

RFC estate's debts within a reasonable period of time.

29. On June 25, 1984, the fair value of RFC's debts exceeded the fair value of its assets.

30. On each and every day in the period from June 25, 1984 to September 24, 1984, and including the date of the transfer at issue, the sum of RFC's debts exceeded the fair value of its assets, and therefore RFC was insolvent on those dates within the meaning of § 547 of the Bankruptcy Code.

31. The transfer of $26,465.03 on September 19, 1984 was in payment of RFC's obligations to the defendants under passbook account certificate number 7006023.

32. The Court finds that the evidence establishing the debtor's insolvency

on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

33. The transfer at issue enabled the defendants to receive more than they would have received if the case were a case under chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

34. Defendants were the initial transferees of the foregoing transfer and

were the persons whose benefit the transfer was made.

35. From September 19, 1984 to September 24, 1984, defendants furnished to RFC no new value.

36. The transfer was in payment of a debt incurred in the ordinary course of business or financial affairs of RFC.

37. The transfer was made in the ordinary course of business or financial affairs of RFC.

38. The transfer was made according to ordinary business terms.

39. The transfer was made in payment of a debt incurred in the ordinary course of business or financial affairs of the defendants.

40. The transfer was made in the ordinary course of business or financial affairs of the defendants.

41. Defendants have failed to establish by clear and convincing evidence that RFC obtained funds from defendants on April 21, 1981 through false, fraudulent, or misleading representations or statements of material fact. Defendants further have failed to establish by clear and convincing evidence that they reasonably relied on any false, fraudulent, or misleading misrepresentations in purchasing passbook account certificate number 7006023. Defendants further have failed to establish by clear and convincing evidence that they were fraudulently induced to purchase passbook account certificate number 7006023.

42. RFC routinely and regularly commingled all funds received through the sale of its thrift certificates or passbook account certificates, in one single

operating account with Sunbelt Bank and Trust, of Tulsa, Oklahoma, which account was used for all general operations of RFC. Defendants have failed to introduce any evidence showing that they can trace any funds furnished to RFC for the purchase of passbook account certificate number 7006023.

43. The defendants have failed to establish that the postpetition conduct of the trustee, successor trustee, or their agents was improper, or grossly inequitable. To the contrary, with respect to the acts complained of by defendants, this Court specifically finds as follows:

(a) At a hearing on March 21, 1986, and in its order dated March 21, 1986 in this case, this Court approved the notice and confirmation of the RFC plan of

reorganization and found that the same was proper and in compliance with all requirements of the Bankruptcy Code in all respects;

(b) At a hearing on October 8, 1986, and in its order of October 15, 1986, this Court affirmed and approved the successor trustee's abandonment of, and decision to not pursue preference claims of less than $5,000.00 and the decision to not seek to avoid or recover transfers of funds between RFC and Republic Trust & Savings Company; and

(c) At a hearing on September 23, 1985, and in its order dated December 4, 1985 in this case, this Court approved the omnibus settlement agreement between the RFC and Republic Trust estates.

CONCLUSIONS OF LAW

1. RFC is qualified to be a debtor under 11 U.S.C. § 109 and this Court has jurisdiction over the subject matter of this adversary proceeding. See order entered January 19, 1986 in In re Republic Financial Corp., case number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, and In re Republic Trust & Savings Company, 59 B.R. 606 (Bkrtcy. N.D. Okla. 1986); affirmed by order entered March 19, 1987 in the United States District Court for the Northern District of Oklahoma, case numbers 86-C-77-B and 86-C-312-B (consolidated).

2. The RFC bankruptcy case was commenced prior to October 8, 1984, and the 1984 Amendments to Section 547 of the Bankruptcy Code are not applicable to this adversary proceeding. Memorandum opinion

dated April 9, 1987 in R. Dobie Langenkamp v. Saied, adversary number 85-0302, United States Bankruptcy Court for the Northern District of Oklahoma.

3. The defendants have no right to a trial by jury of this adversary proceeding. Order entered February 26, 1987 in R. Dobie Langenkamp v. Hackler, adversary number 85-0305, United States Bankruptcy Court for the Northern District of Oklahoma; see also In re Southern Industrial Banking Corp., 70 B.R. 196, 201-202 (E.D. Tenn. 1986)

4. The principal debt under RFC passbook account certificate number 7006023 was incurred upon the issuance of such certificate. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding number 85-0302, in the United States

Bankruptcy Court for the Northern District of Oklahoma, p. 7; Barash v. Public Finance Corporation, 658 F.2d 504, 509-511 (7th Cir. 1981); In re Property Leasing & Management, Inc., 46 B.R. 903, 913-14 (Bkrtcy. E.D. Tenn. 1985); In re Head, 26 B.R. 578, 580 (Bkrtcy. M.D. Fla. 1983) In re McCormick, 5 B.R. 726, 730 (Bkrtcy. N.D. Ohio 1980).

5. The interest debt under RFC passbook account certificate number 7006023 was incurred upon the issuance of the certificate. In re Acme-Dunham, Inc., 50 B.R. 734, 740-42 (D. Maine 1985); In re Property Leasing and Management, Inc., 46 B.R. at 913-14; In re Goodman Industries, Inc., 21 B.R. 512, 521 (Bkrtcy. D. Mass. 1982).

6. The transfer was made more than 45 days after the debt was incurred. See

memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding no. 85-0302, p. 7.

7. The defendants were, by virtue of the foregoing thrift certificate, at the time of the transfer, creditors of RFC. See order entered January 17, 1986 in In re Republic Financial Corp., case number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, at p. 2; cf. In re Republic Trust, 59 B.R. at 613.

8. The transfer was for or on account of an antecedent debt owed by RFC to the defendants before such transfer was made.

9. Defendants' claim that they were denied due process and that they have a total and complete setoff because they were not given notice of the RFC

bankruptcy proceedings is not a defense to this avoidance action under 11 U.S.C. §§ 547 and 550. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding number 87-0302, at pp. 8-9.

10. The payment by RFC to defendants on September 19, 1984 was not a settlement payment for a security within the meaning of 11 U.S.C. §§ 546(e) and 741(8). 11 U.S.C. § 741, et seq. governs liquidation of stockbroking entities, not financial entities such as RFC. See generally 4 COLLIER ON BANKRUPTCY, ¶ 741 et seq., subchapter III (15th ed. 1986); cf. Baroff, 497 F.2d at 282-283; In re Hanover Square Securities, 55 B.R. 235, 237-239 (Bkrtcy. S.D.N.Y. 1985) In re John Muir & Co., 51 B.R. 150, 152-153 (Bkrtcy. S.D.N.Y. 1985). RFC was not a stockbroker

or stockbroking entity, and RFC's payments to its creditors under RFC thrift certificates were not made from or for a securities account or securities accounts.

11 U.S.C. § 741 supplies definitions "for this subchapter." In particular, § 741(2)(A) defines "customer," as "an entity with whom the debtor deals as a principal or agent and that holds a claim against the debtor on account of a security received, acquired, or held by the debtor in the ordinary course of business as a stockbroker from or for the securities account or accounts of such entity." The definition of "customer" contained in 11 U.S.C. § 741(2) is based upon the definition found in the Security Investor Protection Act ("SIPA"), 15 U.S.C. § 78111(2). 4 COLLIER ON BANKRUPTCY, at ¶ 74102, 741-5.

Purchasers of RFC thrift certificates were not "customers" as that term is used in 11 U.S.C. § 741 et seq. The defendants therefore were not securities "customers" under the Bankruptcy Code of the SIPA. Cf. SEC v. Baroff, 497 F.2d 280, 282-285 (2nd Cir. 1974); cf. Securities Investor Protection Corporation v. Executive Securities Corp., 423 F.Supp. 94, 96-98 (S.D.N.Y. 1976), aff'd 556 F.2d 98 (2nd Cir. 1977). If an individual RFC creditor was not a "customer," then the debtor, RFC, would not be a stockbroker as defined by 11 U.S.C. § 101(46) with regard to its transactions with its creditors. 4 COLLIER ON BANKRUPTCY, ¶ 741.02, 741-10. This Court has already determined that purchasers of Republic thrift certificates were creditors with an unsecured claim. See, e.g., In re Republic Trust & Savings

Co., 59 B.R. 606, 608, 613 (Bkrtcy. N.D. Okla. 1986) (analyzing the nature of the relationship between the debtor and holders of the thrift certificates issued by RFC's affiliate, Republic Trust & Savings Company, which were identical to the certificates issued by RFC characterizing the relationship as one of debtor-creditor). See also order confirming trustee's plan of reorganization of Republic Financial Corporation, entered March 21, 1986, wherein the claims of thrift certificate holders are allowed and treated as general unsecured claims in pari passu with all other general creditors such as trade creditors and the like.

11. Defendants have failed to prove the elements of fraud or tracing required to establish a constructive trust. See In

re Heston Oil Co., 63 B.R. 711, 714 (Bkrtcy. N.D. Okla. 1986).

12. The trustee did not bring this action pursuant to any provision of the RFC plan of reorganization. Rather this action was commenced pursuant to the trustee's avoiding powers under §§ 547 and 550 of the Bankruptcy Code. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding no. 85-0302, p. 8.

13. Because there is no evidence of inequitable or improper conduct by the trustee, the successor trustee, or their agents, as a matter of law, the successor trustee is not estopped from pursuing the remedies available against the defendants in this adversary proceeding under §§ 547 and 550 of the Bankruptcy Code. In the alternative, and even assuming arguendo

that the conduct complained of by defendants was proven, such conduct would not constitute a defense to an action for recovery pursuant to 11 U.S.C. §§ 547 and 550.

14. The plaintiff has established all of the elements necessary to avoid the transfer to defendants under 11 U.S.C. § 547 and to recover the transfer under 11 U.S.C. § 550. The Court concludes that plaintiff is entitled to recover from defendants the sum of $26,465.03 due to the avoidability of the transfer under the theories of law noted above.

15. Under the decisions interpreting 28 U.S.C. § 1961, prejudgment interest is recoverable in actions under §§ 547 and 550 from the date of demand for return of the transfer, or if no formal demand is made, from the date of the filing the

adversary proceeding seeking the return. See e.g., In re H. P. King Company, Inc., 64 B.R. 487 (Bkrtcy. E.D.N.C. 1986); In re AOV Industries, Inc., 62 B.R. 968 (Bkrtcy. D.D.C. 1986); In re Universal Clearing House Co., 60 B.R. 985 (Bkrtcy. D. Utah 1986). Based upon the records maintained by the United States Court Clerk for the Northern District of Oklahoma and pursuant to the directives of 28 U.S.C. § 1961, the interest rate applicable at the time of the filing of this adversary proceeding was 7.87 percent per annum. Plaintiff is therefore entitled to interest on the sum of $26,465.03 at the rate of 7.87 percent per annum, compounded annually, from October 3, 1985 through the date of the entry of judgment herein. Thereafter, pursuant to 28 U.S.C. § 1961, interest on the total of the principal amount, plus

all interest accrued at the prejudgment rate to that time, shall be calculated at the then applicable rate of interest pursuant to 28 U.S.C. § 1961, until paid.

16. The Court finds that judgment should be entered in favor of the plaintiff herein, and against defendants in the total sum of $26,465.03 in principal, together with interest accrued thereon from October 3, 1985 until the entry of judgment herein at the rate of 7.87 percent per annum, and thereafter accruing at the then applicable rate under 28 U.S.C. § 1961 until paid, together with costs incurred by plaintiff in connection herewith. Judgment shall be entered accordingly in conformity with Rule 7054, Rules of Bankruptcy Procedure.

DATED this 26th day of June, 1987.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re	)	
	)	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	)	Bankruptcy Case No. 84-01460 Chapter 11
	)	
Debtor.	)	
	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
	)	
Plaintiff,	)	Adversary No. 85-0304
vs.	)	
	)	
KENNETH D. MOORE and MARY L. MOORE,	)	
	)	
Defendants.	)	FINDINGS OF FACT AND CONCLUSIONS

This matter came on for trial before the Court on June 1, 1987. The plaintiff was represented by Sam G. Bratton, II, John J. Carwile, and Richard H. Foster, of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma; the defendants were represented William E. Rutledge and Tony W. Haynie, of Conner & Winters,

Tulsa, Oklahoma, and Hal F. Morris, of Chapel, Wilkinson, Riggs, Abney & Henson, Tulsa, Oklahoma. Trial was concluded on June 5, 1987, at which time the Court took this matter under advisement.

The Court, now having duly considered the evidence presented to it, together with the memoranda and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is the successor trustee of the estate of Republic Financial Corporation ("RFC"), the debtor in the above-captioned bankruptcy proceeding.

2. This Chapter 11 bankruptcy proceeding was commenced on September 24, 1984.

3. Jack D. Jones was appointed trustee in the case on October 31, 1984.

4. R. Dobie Langenkamp was appointed successor trustee in the case on May 9, 1986, effective May 16, 1986.

5. RFC was an uninsured financial institution, principally engaged in the business of issuing evidence of debt and the making of commercial and personal loans, both secured and unsecured.

6. On or about April 4, 1984, in exchange for cash or other valuable consideration from the defendants worth $91,000.00, RFC issued to the defendants that certain thrift certificate number 1401423, dated April 4, 1984, in the principal amount of $91,000.00.

7. During the 90-day period immediately preceding the date of the filing of the bankruptcy petition herein, RFC made the following transfers of its property to or for the benefit of the

defendants (hereinafter "the transfers"), to-wit:

DATE	AMOUNT
July 10, 1984	$91,000.00
August 29, 1984	2,187.17
September 18, 1984	2,027.11

8. The transfers of $2,187.17 and $2,027.11 on August 29 and September 18, 1984, respectively, were wire transfers to Republic Trust & Savings Company, an affiliate of RFC. The transfer on July 10, 1984 was made through RFC check number 45278, in the amount of $91,000.00, which the defendants received and defendant Kenneth D. Moore endorsed.

9. The principal asset of RFC was its loan portfolio.

10. The liabilities of RFC consisted primarily of its obligations to purchasers

of its thrift certificates and passbook thrift certificates.

11. RFC was primarily a collateral lender.

12. prior to September 24, 1984, RFC routinely engaged in unsafe and unsound lending practices. These practices included:

(a) RFC did not properly evaluate loan requests in terms of credit history, character, capacity to repay, collateral value, or adequacy of capital or net worth;

(b) RFC did not evaluate loan requests with respect to the effects of worsening economic conditions;

(c) RFC and its borrowers did not agree upon a loan repayment program at the time of loan origination;

(d) RFC made loans that did not provide for periodic payments;

(e) RFC made and reviewed loans without adequate collateral appraisals or title searches;

(f) RFC deferred and extended loans without full payment of interest and reduction of principal;

(g) RFC made an inordinate number of loans to officers and directors, their relatives and other corporations or entities controlled by them, wholly without adequate security for the loans or other reasonable prospects for repayment;

(h) RFC failed to recognize or establish adequate loan loss reserves against nonperforming or poor quality loans;

(i) RFC intentionally misrepresented the quality or character of nonperforming or low quality loans and took affirmative actions to disguise the true quality of such loans.

13. On June 29, 1984, through a corporate reorganization referred to as "the divestiture," ownership of RFC was transferred from its parent corporation, Republic Bancorporation, Inc. ("Old RBI") to a newly formed parent corporation, also known as Republic-bancorpration Inc. ("New RBI"). Prior to the divestiture, Old RBI was indebted to RFC in the amount of $1.5 million. In the divestiture transaction, this debt was transferred to New RBI. As a result of the divestiture, RFC encountered significant and devastating liquidity problems, and the divestiture

seriously impaired RFC's ability to raise capital.

14. The general ledger balance sheets for RFC show a $1.5 million to either Old RBI or New RBI as an asset on every day from June 25, 1984 to September 24, 1984.

15. On the date of the transfers at issue herein and at all times during the 90-day period immediately preceding the filing of the bankruptcy petition New RBI was completely unable to repay the $1.5 million loan, and the fair value of this loan was zero.

16. The debtor's schedules list property totaling $21,604,279.67 and debts of $25,196,162.30, as of September 24, 1984, the date of the filing of RFC's petition.

17. Harold J. Madigan, an independent loan portfolio expert, rendered an opinion that on June 25, 1984, 52 loans in RFC's loan portfolio were overvalued in the amount of at least $11,914,917.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in the amount of the overvaluation would render RFC insolvent on June 25, 1984.

18. Touche, Ross & Co. was retained by the trustee to perform a comprehensive investigation and analysis of RFC's affairs and condition. Richard Spillers on behalf of Touche, Ross & Co. rendered an opinion that on June 25, 1984, RFC's assets were overvalued in the amount of at least $8,001,000.00. Spillers further rendered an opinion that a write-down or

reserve against the assets of RFC in the amount of the overvaluation would render RFC insolvent on June 25, 1984.

19. Harold J. Madigan, an independent loan portfolio expert, also rendered an opinion that on September 24, 1984, 30 loans in RFC's loan portfolio were overvalued in the amount of at least $12,040,413.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in this amount would render RFC insolvent on September 24, 1984.

20. Touche, Ross & Co. reviewed the debtor's financial statements for each of the 90 days next preceding the filing of the debtor's petition and was of the

opinion that RFC was insolvent on each such date.

21. There were no developments from June 25, 1984 to September 24, 1984 that improved the financial condition of RFC.

22. The affirmative evidence offered by defendants to support a claim of solvency consisted of the testimony of Ansil L. Ludwick, former president of RFC, the testimony of Paul Anderson, former vice chairman of RFC, and the unaudited daily general ledger balance sheets for RFC prepared during the 90-day period prior to bankruptcy.

23. From June 25, 1984 to September 24, 1984 the loan portfolio asset values shown on the RFC general ledger balance sheets were significantly overstated.

24. The Court finds the daily general ledger balance sheets to be

unreliable evidence of RFC's financial condition or its asset value from June 25, 1984 to September 24, 1984.

25. The Court finds that the testimony of Ansil L. Ludwick and Paul Anderson that RFC was solvent from June 25, 1984 to September 24, 1984 is not credible and is contradicted by the evidence introduced by the plaintiff.

26. The RFC estate's lawsuit against Aetna Casualty and Surety Company ("Aetna") is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RFC estate's debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under

§ 547(b)(3) and the test for greater recovery under § 547(b)(5), the Court finds the value of this asset to be zero.

27. The RFC estate's lawsuit against Peat, Marwick, Mitchell & Co. is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RFC estate's debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b)(3) and the test for greater recovery under § 547(b)(5), the Court finds the value of this asset to be zero.

28. There is no evidence of the existence of any claims or causes of action, other than collections, that could

be rendered available for payment of the RFC estate's debts within a reasonable period of time.

29. On June 25, 1984, the fair value of RFC's debts exceeded the fair value of its assets.

30. On each and every day in the period from June 25, 1984 to September 24, 1984, and including the dates of the transfers at issue, the sum of RFC's debts exceeded the fair value of its assets, and therefore RFC was insolvent on those dates within the meaning of § 547 of the Bankruptcy Code.

31. The transfers on July 10, August 29, and September 18, 1984 were in payment of RFC's obligations to the defendants under thrift certificate number 1401423.

32. The Court finds that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfers had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

33. The transfers at issue enabled the defendants to receive more than they would have received if the case were a case under Chapter 7 of the Bankruptcy Code, the transfers had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

34. Defendants were the initial transferees of the foregoing transfers and were the persons whose benefit the transfers were made.

35. From July 10, 1984 to September 24, 1984, defendants furnished to RFC new value totaling $4,214.28.

36. The transfers were in payment of a debt incurred in the ordinary course of business or financial affairs of RFC.

37. The transfers were made in the ordinary course of business or financial affairs of RFC.

38. The transfers were made according to ordinary business terms.

39. The transfers were made in payment of a debt incurred in the ordinary course of business or financial affairs of the defendants.

40. The transfers were made in the ordinary course of business or financial affairs of the defendants.

41. Defendants have failed to establish by clear and convincing evidence that RFC obtained the $91,000.00 from defendants on April 4, 1984 through false, fraudulent, or misleading representations or statements of material fact. Defendants further have failed to establish by clear and convincing evidence that they reasonably relied on any false, fraudulent, or misleading misrepresentations in purchasing thrift certificate number 1401423. Defendants further have failed to establish by clear and convincing evidence that they were fraudulently induced to purchase thrift certificate number 1401423.

42. RFC routinely and regularly commingled all funds received through the sale of its thrift certificates or passbook account certificates, in one single operating account with Sunbelt Bank and Trust, of Tulsa, Oklahoma, which account was used for all general operations of RFC. Defendants have failed to introduce any evidence showing that they can trace the $91,000.00 paid to RFC for the purchase of thrift certificate number 1401423.

43. The defendants have failed to establish that the postpetition conduct of the trustee, successor trustee, or their agents was improper, or grossly inequitable. To the contrary, with respect to the acts complained of by defendants, this Court specifically finds as follows:

(a) At a hearing on March 21, 1986, and in its order dated March 21, 1986 in this case, this Court approved the notice and confirmation of the RFC plan of reorganization and found that the same was proper and in compliance with all requirements of the Bankruptcy Code in all respects;

(b) At a hearing on October 8, 1986, and in its order of October 15, 1986, this Court affirmed and approved the successor trustee's abandonment of, and decision to not pursue preference claims of less than $5,000.00 and the decision to not seek to avoid or recover transfers of funds between RFC and Republic Trust & Savings Company; and

(c) At a hearing on September 23, 1985, and in its order dated

December 4, 1985 in this case, this Court approved the omnibus settlement agreement between the RFC and Republic Trust estates.

CONCLUSIONS OF LAW

1. RFC is qualified to be a debtor under 11 U.S.C. § 109 and this Court has jurisdiction over the subject matter of this adversary proceeding. See order entered January 19, 1986 in In re Republic Financial Corp., case number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, and In re Republic Trust & Savings Company, 59 B.R. 606 (Bkrtcy. N.D. Okla. 1986); affirmed order entered March 19, 1987 in the United States District Court for the Northern District of Oklahoma, case numbers 86-C-77-B and 86-C-312-B (consolidated).

2. The RFC bankruptcy case was commenced prior to October 8, 1984, and the 1984 Amendments to Section 547 of the Bankruptcy Code are not applicable to this adversary proceeding. Memorandum opinion dated April 9, 1987 in R. Dobie Langenkamp v. Saied, adversary number 85-0302, United States Bankruptcy Court for the Northern District of Oklahoma.

3. The defendants have no right to a trial by jury of this adversary proceeding. Order entered February 26, 1987 in R. Dobie Langenkamp v. Moore, adversary number 85-0304, United States Bankruptcy Court for the Northern District of Oklahoma; see also In re Southern Industrial Banking Corp., 70 B.R. 196, 201-202 (E.D. Tenn. 1986).

4. The principal debt under RFC thrift certificate number 1401423 was

incurred upon the issuance of such thrift certificate. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding number 85-0302, in the United States Bankruptcy Court for the Northern District of Oklahoma, p. 7; Barash v. Public Finance Corporation, 658 F.2d 504, 509-511 (7th Cir. 1981); In re Property Leasing & Management, Inc., 46 B.R. 903, 913-14 (Bkrtcy. E.D. Tenn. 1985); In re Read, 26 B.R. 578, 580 (Bkrtcy. M.D. Fla. 1983); In re McCormick, 5 B.R. 726, 730 (Bkrtcy. N.D. Ohio 1980).

5. The interest debt under RFC thrift certificate number 1401423 was incurred upon the issuance of the certificate. In re Acme-Dunham, Inc., 50 B.R. 734, 740-42 (D. Maine 1985); In re Property Leasing and Management, Inc., 46 B.R.

at 913-14; In re Goodman Industries, Inc., 21 B.R. 512, 521 (Bkrtcy. D. Mass. 1982).

6. The transfers were made more than 45 days after the debt was incurred. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding no. 85-0302, p. 7.

7. The defendants were, by virtue of the foregoing thrift certificate, at the time of the transfers, creditors of RFC. See order entered January 17, 1986 in In re Republic Financial Corp., case number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, at p. 2; cf. In re Republic Trust, 59 B.R. at 613.

8. The transfers were for or on account of an antecedent debt owed by RFC to the defendants before such transfers were made.

9. Defendants' claim that they were denied due process and that they have a total and complete setoff because they were not given notice of the RFC bankruptcy proceedings is not a defense to this avoidance action under 11 U.S.C. §§ 547 and 550. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding number 87-0302, at pp. 8-9.

10. The payment by RFC to defendants on July 10, 1984, was not a settlement payment for a security within the meaning of 11 U.S.C. §§ 546(e) and 741(8). 11 U.S.C. § 741, et seq. governs liquidation of stockbroking entities, not financial entities such as RFC. See generally 4 COLLIER ON BANKRUPTCY, ¶ 741 et seq., subchapter III (15th ed. 1986); cf. Baroff, 497 F.2d at 282-283; In re Hanover

Square Securities, 55 B.R. 235, 237-239 (Bkrtcy. S.D.N.Y. 1985); In re John Muir & Co., 51 B.R. 150, 152-153 (Bkrtcy. S.D.N.Y. 1985). RFC was not a stockbroker or stockbroking entity, and RFC's payments to its creditors under RFC thrift certificates were not made from or for a securities account or securities accounts.

11 U.S.C. § 741 supplies definitions "for this subchapter." In particular, § 741(2)A) defines "customer," as "an entity with whom the debtor deals as a principal or agent and that holds a claim against the debtor on account of a security received, acquired, or held by the debtor in the ordinary course of business as a stockbroker from or for the securities account or accounts of such entity." The definition of "customer" contained in 11 U.S.C. § 741(2) is based upon the

definition fourid in the Security Investor Protection Act ("SIPA"), IS U.S.C. § 78111(2). 4 COLLIER ON BANKRUPTCY, at ¶ 741.02, 741-5.

Purchasers of RFC thrift certificates were not "customers" as that term is used in 11 U.S.C. § 741 et seq. The defendants therefore were not securities "customers" under the Bankruptcy Code or the SIPA. Cf. SEC v. Baroff, 497 F.2d 280, 282-285 (2nd Cir. 1974); cf. Securities Investor Protection Corporation v. Executive Securities Corp., 423 F.Supp. 94, 96-98 (S.D.N.Y. 1976), aff'd 556 F.2d 98 (2nd Cir. 1977). If an individual RFC creditor was not a "customer," then the debtor, RFC, would not be a stockbroker as defined by 11 U.S.C. § 101(46) with regard to its transactions with its creditors. 4 COLLIER ON BANKRUPTCY, 741.02, 741-10.

This Court has already determined that purchasers of Republic thrift certificates were creditors with an unsecured claim. See, In re Republic Trust & Savings Co., 59 B.R. 606, 608, 613 (Bkrtcy. N.D. Okla. 1986) (analyzing the nature of the relationship between the debtor and holders of the thrift certificates issued by RFC's affiliate, Republic Trust & Savings Company, which were identical to the certificates issued by RFC characterizing the relationship as one of debtor-creditor). See also order confirming trustee's plan of reorganization of Republic Financial Corporation, entered March 21, 1986, wherein the claims of thrift certificate holders are allowed and treated as general unsecured claims in pari passu with all other general creditors such as trade creditors and the like.

11. Defendants have failed to prove the elements of fraud or tracing required to establish a constructive trust. See In re Heston Oil Co., 63 B.R. 711, 714 (Bkrtcy. N.D. Okla. 1986).

12. The trustee did not bring this action pursuant to any provision of the RFC plan of reorganization. Rather this action was commenced pursuant to the trustee's avoiding powers under §§ 547 and 550 of the Bankruptcy Code. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding no. 85-0302, p. 8.

13. Because there is no evidence of inequitable or improper conduct by the trustee, the successor trustee, or their agents, as a matter of law, the successor trustee is not estopped from pursuing the remedies available against the defendants

in this adversary proceeding under §§ 547 and 550 of the Bankruptcy Code. In the alternative, and even assuming arguendo that the conduct complained of by defendants was proven, such conduct would not constitute a defense to an action for recovery pursuant to 11 U.S.C. §§ 547 and 550.

14. The plaintiff has established all of the elements necessary to avoid the transfers to defendants under 11 U.S.C. § 547 and to recover the transfers under 11 U.S.C. § 550. The Court concludes that plaintiff is entitled to recover from defendants the sum of $91,000.00 due to the avoidability of this transfer under the theories of law noted above.

15. Under the decisions interpreting 28 U.S.C. § 1961, prejudgment interest is recoverable in actions under §§ 547 and

550 from the date of demand for return of the transfer, or if no formal demand is made, from the date of the filing the adversary proceeding seeking the return. See In re H. P. King Company, Inc., 64 B.R. 487 (Bkrtcy. E.D.N.C. 1986); In re AOV Industries, Inc., 62 B.R. 968 (Bkrtcy. D.D.C. 1986); In re Universal Clearing House Co., 60 B.R. 985 (Bkrtcy. D. Utah 1986). Based upon the records maintained by the United States Court Clerk for the Northern District of Oklahoma and pursuant to the directives of 28 U.S.C. § 1961, the interest rate applicable at the time of the filing of this adversary proceeding was 7.87 percent per annum. Plaintiff is therefore entitled to interest on the sum of $91,000.00 at the rate of 7.87 percent per annum, compounded annually, from October 3, 1985 through the date of the

entry of judgment herein. Thereafter, pursuant to 28 U.S.C. § 1961, interest on the total of the principal amount, plus all interest accrued at the prejudgment rate to that time, shall be calculated at the then applicable rate of interest pursuant to 28 U.S.C. § 1961, until paid.

16. The Court finds that judgment should be entered in favor of the plaintiff herein, and against defendants in the total sum of $91,000.00 in principal, together with interest accrued thereon from October 3, 1985 until the entry of judgment herein at the rate of 7.87 percent per annum, and thereafter accruing at the then applicable rate under 28 U.S.C. § 1961 until paid, together with costs incurred by plaintiff in connection herewith. Judgment shall be entered

accordingly in conformity with Rule 7054, Rules of Bankruptcy Procedure.

DATED this 26th day of June, 1987.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re	)	
	)	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	)	Bankruptcy Case No. 84-01460 Chapter 11
	)	
Debtor.	)	
	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
	)	
Plaintiff,	)	Adversary No. 85-0302
vs.	)	
	)	
KEMAL SAIED and CONSTANCE G. SAIED,	)	
	)	FINDINGS OF FACT
Defendants.	)	AND CONCLUSIONS
	)	OF LAW

This matter came on for trial before the Court on June 1, 1987. The plaintiff was represented by Sam G. Bratton, II, John J. Carwile, and Richard H. Foster, of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma; the defendants were represented by William E. Rutledge

and Tony W. Haynie, of Conner & Winters, Tulsa, Oklahoma, and Chris Economou, Tulsa, Oklahoma. Trial was concluded on June 5, 1987, at which time the Court took this matter under advisement.

The Court, now having duly considered the evidence presented to it, together with the memoranda and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is the successor trustee of the estate of Republic Financial Corporation ("RFC" the debtor in the above-captioned bankruptcy proceeding.

2. This Chapter 11 bankruptcy proceeding was commenced on September 24, 1984.

3. Jack D. Jones was appointed trustee in the case on October 31, 1984.

4. R. Dobie Langenkamp was appointed successor trustee in the case on May 9, 1986, effective May 16, 1986.

5. RFC was an uninsured financial institution, principally engaged in the business of issuing evidence of debt and the making of commercial and personal loans, both secured and unsecured.

6. On or about December 9, 1983, in exchange for cash or other valuable consideration from the defendants worth $75,000.00, RFC issued to the defendants that certain thrift certificate number 1401332, dated December 9, 1983, in the principal amount of $75,000.00.

7. During the 90-day period immediately preceding the date of the filing of the bankruptcy petition herein, RFC made the following transfer of its property to or for the benefit of the

defendants (hereinafter "the transfer"), to-wit:

DATE	AMOUNT
July 9, 1984	$75,000.00

8. The foregoing transfer was made through RFC check number 45334, in the amount of $75,000.00, which the defendants received and endorsed.

9. The principal asset of RFC was its loan portfolio.

10. The liabilities of RFC consisted primarily of its obligations to purchasers of its thrift certificates and passbook thrift certificates.

11. RFC was primarily a collateral lender.

12. Prior to September 24, 1984, RFC routinely engaged in unsafe and unsound lending practices. These practices included:

(a) RFC did not properly evaluate loan requests in terms of credit history, character, capacity to repay, collateral value, or adequacy of capital or net worth;

(b) RFC did not evaluate loan requests with respect to the effects of worsening economic conditions;

(c) RFC and its borrowers did not agree upon a loan repayment program at the time of loan origination;

(d) RFC made loans that did not provide for periodic payments;

(e) RFC made and reviewed loans without adequate collateral appraisals or title searches;

(f) RFC deferred and extended loans without full payment of interest and reduction of principal;

(g) RFC made an inordinate number of loans to officers and directors, their relatives and other corporations or entities controlled by them, wholly without adequate security for the loans or other reasonable prospects for repayment;

(h) RFC failed to recognize or establish adequate loan loss reserves against nonperforming or poor quality loans;

(i) RFC intentionally misrepresented the quality or character of nonperforming or low quality loans and took affirmative actions to disguise the true quality of such loans.

13. On June 29, 1984, through a corporate reorganization referred to as "the divestiture," ownership of RFC was

transferred from its parent corporation, Republic Bancorporation, Inc. ("Old RBI") to a newly formed parent corporation, also known as Republic-Bancorporation, Inc. ("New RBI") Prior to the divestiture, Old RBI was indebted to RFC in the amount of $1.5 million. In the divestiture transaction, this debt was transferred to New RBI. As a result of the divestiture, RFC encountered significant and devastating liquidity problems, and the divestiture seriously impaired RFC's ability to raise capital.

14. The general ledger balance sheets for RFC show a $1.5 million to either Old RBI or New RBI as an asset on every day from June 25, 1984 to September 24, 1984.

15. On the date of the transfer at issue and at all times during the 90-day

period immediately preceding the filing of the bankruptcy petition New RBI was completely unable to repay the $1.5 million loan, and the fair value of this loan was zero.

16. The debtor's schedules list property totaling $21,604,279.67 and debts of $25,196,162.30, as of September 24, 1984, the date of the filing of RFC's petition.

17. Harold J. Madigan, an independent loan portfolio expert, rendered an opinion that on June 25, 1984, 52 loans in RFC's loan portfolio were overvalued in the amount of at least $11,914,917.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans

in the amount of the overvaluation would render RFC insolvent on June 25, 1984.

18. Touche, Ross & Co. was retained by the trustee to perform a comprehensive investigation and analysis of RFC's affairs and condition. Richard Spillers on behalf of Touche, Ross & Co. rendered an opinion that on June 25, 1984, RFC's assets were overvalued in the amount of at least $8,001,000.00. Spillers further rendered an opinion that a write-down or reserve against the assets of RFC in the amount of the overvaluation would render RFC insolvent on June 25, 1984.

19. Harold J. Madigan, an independent loan portfolio expert, also rendered an opinion that on September 24, 1984, 30 loans in RFC's loan portfolio were overvalued in the amount of at least $12,040,413.00, and he further rendered an

opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in this amount would render RFC insolvent on September 24, 1984.

20. Touche, Ross & Co. reviewed the debtor's financial statements for each of the 90 days next preceding the filing of the debtor's petition and was of the opinion that RFC was insolvent on each such date.

21. There were no developments from June 25, 1984 to September 24, 1984 that improved the financial condition of RFC.

22. The affirmative evidence offered by defendants to support a claim of solvency consisted of the testimony of Ansil L. Ludwick, former president of RFC, the testimony of Paul Anderson, former

vice chairman of RFC, and the unaudited daily general ledger balance sheets for RFC prepared during the 90-day period prior to bankruptcy.

23. From June 25, 1984 to September 24, 1984 the loan portfolio asset values shown on the RFC general ledger balance sheets were significantly overstated.

24. The Court finds the daily general ledger balance sheets to be unreliable evidence of RFC's financial condition or its asset value from June 25, 1984 to September 24, 1984.

25. The Court finds that the testimony of Ansil L. Ludwick and Paul Anderson that RFC was solvent from June 25, 1984 to September 24, 1984 is not credible and is contradicted by the evidence introduced by the plaintiff.

26. The RFC estate's lawsuit against Aetna Casualty and Surety Company ("Aetna") is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RFC estate's debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b)(3) and the test for greater recovery under § 547(b)(5), the Court finds the value of this asset to be zero.

27. The RFC estate's lawsuit against Peat, Marwick, Mitchell & Co. is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RFC estate's debts within a reasonable period of time. The Court

finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b)(3) and the test for greater recovery under § 547(b)(5) the Court finds the value of this asset to be zero.

28. There is no evidence of the existence of any claims or causes of action, other than collections, that could be rendered available for payment of the RFC estate's debts within a reasonable period of time.

29. On June 25, 1984, the fair value of RFC's debts exceeded the fair value of its assets.

30. On each and every day in the period from June 25, 1984 to September 24, 1984, and including the date of the

transfer at issue, the sum of RFC's debts exceeded the fair value of its assets, and therefore RFC was insolvent on those dates within the meaning of § 547 of the Bankruptcy Code.

31. The transfer of $75,000.00 of July 9, 1984 was in payment of RFC's obligations to the defendants under thrift certificate number 1401332.

32. The Court finds that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

33. The transfer at issue enabled the defendants to receive more than they would have received if the case were a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

34. Defendants were the initial transferees of the foregoing transfer and were the persons whose benefit the transfer was made.

35. From July 9, 1984 to September 24, 1984, defendants furnished to RFC no new value.

36. The transfer was in payment of a debt incurred in the ordinary course of business or financial affairs of RFC.

37. The transfer was made in the ordinary course of business or financial affairs of RFC.

38. The transfer was made according to ordinary business terms.

39. The transfer was made in payment of a debt incurred in the ordinary course of business or financial affairs of the defendants.

40. The transfer was made in the ordinary course of business or financial affairs of the defendants.

41. Defendants have failed to establish by clear and convincing evidence that RFC obtained the $75,000.00 from defendants on December 9, 1983 through false, fraudulent, or misleading representations or statements of material fact. Defendants further have failed to establish by clear and convincing evidence that

they reasonably relied on any false, fraudulent, or misleading misrepresentations in purchasing thrift certificate number 1401332. Defendants further have failed to establish by clear and convincing evidence that they were fraudulently induced to purchase thrift certificate number 1401332.

42. RFC routinely and regularly commingled all funds received through the sale of its thrift certificates or passbook account certificates, in one single operating account with Sunbelt Bank and Trust, of Tulsa, Oklahoma, which account was used for all general operations of RFC. Defendants have failed to introduce any evidence showing that they can trace the $75,000.00 paid to RFC for the purchase of thrift certificate number 1401332.

43. The defendants have failed to establish that the postpetition conduct of the trustee, successor trustee, or their agents was improper, or grossly inequitable. To the contrary, with respect to the acts complained of by defendants, this Court specifically finds as follows:

(a) At a hearing on March 21, 1986, and in its order dated March 21, 1986 in this case, this Court approved the notice and confirmation of the RFC plan of reorganization and found that the same was proper and in compliance with all requirements of the Bankruptcy Code in all respects;

(b) At a hearing on October 8, 1986, and in its order of October 15, 1986, this Court affirmed and approved the successor trustee's

abandonment of, and decision to not pursue preference claims of less than $5,000.00 and the decision to not seek to avoid or recover transfers of funds between RFC and Republic Trust & Savings Company; and

(c) At a hearing on September 23, 1985, and in its order dated December 4, 1985 in this case, this Court approved the omnibus settlement agreement between the RFC and Republic Trust estates.

CONCLUSIONS OF LAW

1. RFC is qualified to be a debtor under 11 U.S.C. § 109 and this Court has jurisdiction over the subject matter of this adversary proceeding. See order entered January 19, 1986 in In re Republic Financial Corp., case number 84-01460, in the United States Bankruptcy Court for the

Northern District of Oklahoma, and In re Republic Trust & Savings Company, 59 B.R. 606 (Bkrtcy. N.D. Okla. 1986); affirmed by order entered March 19, 1987 in the United States District Court for the Northern District of Oklahoma, case numbers 86-C-77-B and 86-C-312-B (consolidated).

2. The RFC bankruptcy case was commenced prior to October 8, 1984, and the 1984 Amendments to Section 547 of the Bankruptcy Code are not applicable to this adversary proceeding. Memorandum opinion dated April 9, 1987 in R. Dobie Langenkamp v. Saied, adversary number 85-0302, United States Bankruptcy Court for the Northern District of Oklahoma.

3. The defendants have no right to a trial by jury of this adversary proceeding. Order entered February 26, 1987 in R. Dobie Langenkamp v. Saied, adversary

number 85-0302, United States Bankruptcy Court for the Northern District of Oklahoma; see also In re Southern Industrial Banking Corp., 70 B.R. 196, 201-202 (E.D. Tenn. 1986)

4. The principal debt under RFC thrift certificate number 1401332 was incurred upon the issuance of such thrift certificate. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding number 85-0302, in the United States Bankruptcy Court for the Northern District of Oklahoma, p. 7; Barash v. Public Finance Corporation, 658 F.2d 504, 509-511 (7th Cir. 1981); In re Property Leasing & Management, Inc., 46 B.R. 903, 913-14 (Bkrtcy. E.D. Tenn. 1985); In re Head, 26 B.R. 578, 580 (Bkrtcy. M.D. Fla. 1983); In

re McCormick, 5 B.R. 726, 730 (Bkrtcy. N.D. Ohio 1980).

5. The interest debt under RFC thrift certificate number 1401332 was incurred upon the issuance of the certificate. In re Acme-Dunham, Inc., 50 B.R. 734, 740-42 (D. Maine 1985); In re Property Leasing and Management, Inc., 46 B.R. at 913-14; In re Goodman Industries, Inc., 21 B.R. 512, 521 (Bkrtcy. D. Mass. 1982).

6. The transfer was made more than 45 days after the debt was incurred. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding no. 85-0302, p. 7.

7. The defendants were, by virtue of the foregoing thrift certificate, at the time of the transfer, creditors of RFC. See order entered January 17, 1986 in In re Republic Financial Corp., case

number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, at p. 2; cf. In re Republic Trust, 59 B.R. at 613.

8. The transfer was for or on account of an antecedent debt owed by RFC to the defendants before such transfer was made.

9. Defendants' claim that they were denied due process and that they have a total and complete setoff because they were not given notice of the RFC bankruptcy proceedings is not a defense to this avoidance action under II U.S.C. §§ 547 and 550. See memorandum opinion dated April 9, 1987, in R. Dobie Langenkamp v. Saied, adversary proceeding number 87-0302, at pp. 8-9.

10. The payment by RFC to defendants on July 9, 1984, was not a settlement

payment for a security within the meaning of 11 U.S.C. §§ 546(e) and 741(8). 11 U.S.C. § 741, et seq. governs liquidation of stockbroking entities, not financial entities such as RFC. See generally 4 COLLIER ON BANKRUPTCY, ¶ 741 et seq., subchapter III (15th ed. 1986); cf. Baroff, 497 F.2d at 282-283; In re Hanover Square Securities, 55 B.R. 235, 237-239 (Bkrtcy. S.D.N.Y. 1985); In re John Muir & Co., 51 B.R. 150, 152-153 (Bkrtcy. S.D.N.Y. 1985). RFC was not a stockbroker or stockbroking entity, and RFC's payments to its creditors under RFC thrift certificates were not made from or for a securities account or securities accounts.

11 U.S.C. § 741 supplies definitions "for this subchapter." In particular, § 741(2)(A) defines "customer," as "an entity with whom the debtor deals as a

principal or agent and that holds a claim against the debtor on account of a security received, acquired, or held by the debtor in the ordinary course of business as a stockbroker from or for the securities account or accounts of such entity." The definition of "customer" contained in 11 U.S.C. § 741(2) is based upon the definition found in the Security Investor Protection Act ("SIPA"), 15 U.S.C. § 78111(2). 4 COLLIER ON BANKRUPTCY, at ¶ 741.02, 741-5.

Purchasers of RFC thrift certificates were not "customers" as that term is used in 11 U.S.C. § 741 et seq. The defendants therefore were not securities "customers" under the Bankruptcy Code or the SIPA. Cf. SEC v. Baroff, 497 F.2d 280, 282-285 (2nd Cir. 1974); cf. Securities Investor Protection Corporation v. Executive

Securities Corp., 423 F.Supp. 94, 96-98 (S.D.N.Y. 1976), aff'd 556 F.2d 98 (2nd Cir. 1977). If an individual RFC creditor was not a "customer," then the debtor, RFC, would not be a stockbroker as defined by 11 U.S.C. § 101(46) with regard to its transactions with its creditors. 4 COLLIER ON BANKRUPTCY, ¶ 741.02, 741-10. This Court has already determined that purchasers of Republic thrift certificates were creditors with an unsecured claim. See, In re Republic Trust & Savings Co., 59 B.R. 606, 608, 613 (Bkrtcy. N.D. Okla. 1986) (analyzing the nature of the relationship between the debtor and holders of the thrift certificates issued by RFC's affiliate, Republic Trust & Savings Company, which were identical to the certificates issued by RFC characterizing the relationship as one of

debtor-creditor). See also order confirming trustee's plan of reorganization of Republic Financial Corporation, entered March 21, 1986, wherein the claims of thrift certificate holders are allowed and treated as general unsecured claims in pari passu with all other general creditors such as trade creditors and the like.

11. Defendants have failed to prove the elements of fraud or tracing required to establish a constructive trust. See In re Heston Oil Co., 63 B.R. 711, 714 (Bkrtcy. N.D. Okla. 1986).

12. The trustee did not bring this action pursuant to any provision of the RFC plan of reorganization. Rather this action was commenced pursuant to the trustee's avoiding powers under §§ 547 and 550 of the Bankruptcy Code. See memorandum opinion dated April 9, 1987, in R.

Dobie Langenkamp v. Saied, adversary proceeding no. 85-0302, p. 8.

13. Because there is no evidence of inequitable or improper conduct by the trustee, the successor trustee, or their agents, as a matter of law, the successor trustee is not estopped from pursuing the remedies available against the defendants in this adversary proceeding under §§ 547 and 550 of the Bankruptcy Code. In the alternative, and even assuming arguendo that the conduct complained of by defendants was proven, such conduct would not constitute a defense to an action for recovery pursuant to 11 U.S.C. §§ 547 and 550.

14. The plaintiff has established all of the elements necessary to avoid the transfer to defendants under 11 U.S.C. § 547 and to recover the transfer under 11

U.S.C. § 550. The Court concludes that plaintiff is entitled to recover from defendants the sum of $75,000.00 due to the avoidability of the transfer under the theories of law noted above.

15. Under the decisions interpreting 28 U.S.C. § 1961, prejudgment interest is recoverable in actions under §§ 547 and 550 from the date of demand for return of the transfer, or if no formal demand is made, from the date of the filing the adversary proceeding seeking the return. See In re H. P. King Company, Inc., 64 B.R. 487 (Bkrtcy. E.D.N.C. 1986); In re AOV Industries, Inc., 62 B.R. 968 (Bkrtcy. D.D.C. 1986); In re Universal Clearing House Co., 60 B.R. 985 (Bkrtcy. D. Utah 1986). Based upon the records maintained by the United States Court Clerk for the Northern District of Oklahoma and pursuant

to the directives of 28 U.S.C. § 1961, the interest rate applicable at the time of the filing of this adversary proceeding was 7.87 percent per annum. Plaintiff is therefore entitled to interest on the sum of $75,000.00 at the rate of 7.87 percent per annum, compounded annually, from October 3, 1985 through the date of the entry of judgment herein. Thereafter, pursuant to 28 U.S.C. § 1961, interest on the total of the principal amount, plus all interest accrued at the prejudgment rate to that time, shall be calculated at the then applicable rate of interest pursuant to 28 U.S.C. § 1961, until paid.

16. The Court finds that judgment should be entered in favor of the plaintiff herein, and against defendants in the total sum of $75,000.00 in principal, together with interest accrued thereon

from October 3, 1985 until the entry of judgment herein at the rate of 7.87 percent per annum, and thereafter accruing at the then applicable rate under 28 U.S.C. § 1961 until paid, together with costs incurred by plaintiff in connection herewith. Judgment shall be entered accordingly in conformity with Rule 7054, Rules of Bankruptcy Procedure.

DATED this 26th day of June, 1987.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S.C. §101(4)(A)

(4) "claim" means --

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; ....

11 U.S.C. §101(9)(B)

(9) "creditor" means --

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; ....

11 U.S.C. §502(h)

(h) A claim arising from the recovery of property under section 522, 550, 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. §547(c) (1978) (subsequently amended)

(c) The trustee may not avoid under this section a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the

debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

11 U.S.C. §547(c) (1984)

(c) The trustee may not avoid under this section a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms; ....

11 U.S.C. §550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from --

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from --

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection

(a) of this section has a lien on the property recovered to secure the lesser of --

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes --

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of --

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

Bankruptcy Rule 2002(b)

Twenty-five-day Notices to Parties in Interest. Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of (1) the time fixed for filing objections and the hearing to consider approval of a disclosure statement; and (2) the time fixed for filing objections and the hearing to consider confirmation of a plan.

Bankruptcy Rule 3017(d)

Transmission and Notice to Creditors and Equity Security Holders. On approval of a disclosure statement, the debtor in possession, trustee, proponent of the

plan, or clerk as ordered by the court shall mail to all creditors and equity security holders (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; (4) notice of any date fixed for the hearing on confirmation; and (5) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, a form of ballot conforming to Official Form No. 30 shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan

is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered.

Bankruptcy Rule 7007

Rule 7 F.R.Civ.P. applies in adversary proceedings.

Bankruptcy Rule 7012

(a) When Presented. If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different

time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 20 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after

service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of a more definite statement.

(b) Applicability of Rule 12(b)-(h) F.R.Civ.P. Rule 12(b)-(h) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an

allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgment shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Rule 7(a) Federal Rules of Civil Procedure

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, of the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party

complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Rule 12(b) Federal Rules of Civil Procedure

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon

which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleadings sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to an not excluded by the court, the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 13 Federal Rules of Civil Procedure

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of

another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversite, inadvertence, or excusable neglect, or when justice

requires, the pleader may be leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to

a counterclaim or cross-claim in accordance with the provisions of Rule 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §553(a), 98 Stat. 333, 392 (1984).

Sec. 553(a) Except as otherwise provided in this section tne amendments made by this title shall become effective

to cases filed 90 days after the date of enactment of this Act.

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §462(c), 98 Stat. 333, 378 (1984).

Sec. 462(c) Section 547 of title 11 of the United States Code is amended in subsection (c)(2) thereof by striking out subparagraph (B) of such subsection, and by redesignating subparagraphs (C) and (D) thereof as subparagraphs (B) and (C), respectively.

Supreme Court, U.S.
FILED
AUG 2 1990
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CLERK

No. 90-71 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

P.A. HACKLER, DELORES HACKLER, KENNETH D. MOORE, MARY L. MOORE, KEMAL SAIED, AND CONSTANCE G. SAIED,

Petitioners,

v.

R. DOBIE LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS COMPANY AND REPUBLIC FINANCIAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 2, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals correctly hold that the 1978 version (rather than the later 1984 version) of 11 U.S.C. § 547(c)(2) still controlled adversary *proceedings* in a bankruptcy *case* that was itself commenced before the 1984 version went into effect?

II. Did the Tenth Circuit Court of Appeals correctly hold that each Petitioner had no due process right to receive bankruptcy notices (and therefore no setoff defense against Respondent Trustee's preference challenge), given that each Petitioner was merely a preference defendant who had no bankruptcy "claim" against the bankruptcy estate and who therefore did not qualify as a bankruptcy "creditor" entitled to bankruptcy notices?

LIST OF PARTIES

All Petitioners and Respondent are named in the caption. All parties before the U.S. Tenth Circuit Court of Appeals are parties in certiorari petition #90-71 pending before this Court, except the following parties who all elected not to join in petition #90-71: C. A. Culp, Julia Culp, Culp Distributing Company, Leroy Dennis, Janet Dennis, and Hattie Lou Gesin. *See* certiorari petition #90-71 at ii n.1.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Respondent lists below the parent companies, subsidiaries, or affiliates of (i) Republic Trust & Savings Company, and (ii) Republic Financial Corporation. Respondent became the successor trustee for the bankruptcy estates of these two corporations.

A. *Concerning Republic Trust & Savings Company:* Republic Trust & Savings Company also did business as Western Trust & Savings Company. Republic Trust & Savings Company was owned by Republic Bancorporation, Inc., which was owned by Republic Bancorporation, Inc. of Oklahoma. All of the stock of Republic Bancorporation, Inc. of Oklahoma was owned by the McKinney Children's Trusts. The trustees of the McKinney Children's Trusts were Wesley R. McKinney and Wilma Wood. The beneficiaries of the trusts were the children of Wesley R. McKinney. Republic Trust & Savings Company had no corporate subsidiaries.

B. *Concerning Republic Financial Corporation:* Republic Financial Corporation was owned by Republic Bancorporation, Inc., which was owned by Republic Bancorporation, Inc. of Oklahoma. All of the stock of Republic Bancorporation, Inc. of Oklahoma was owned by the McKinney Children's Trusts. The trustees of the McKinney Children's Trusts were Wesley R. McKinney and Wilma Wood. The beneficiaries of the trusts were the children of Wesley R. McKinney. Republic Financial Corporation had no corporate subsidiaries.

C. Republic Trust & Savings Company and Republic Financial Corporation were affiliates. They had no other affiliates except as set forth above.

D. Respondent, R. Dobie Langenkamp, is the duly appointed Successor Trustee of the Bankruptcy Estates of Republic Trust & Savings Company and Republic Financial Corporation.

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I. CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT CORRECTLY APPLIED THE 1978 VERSION OF § 547(c)(2) AND ITS 45-DAY RULE TO A BANKRUPTCY CASE THAT COMMENCED BEFORE THE 1984 VERSION OF § 547(c)(2) EFFECTIVELY REPEALED THE 45-DAY RULE 10

A. The 45-day rule controls the RFC bankruptcy case because the rule's repeal did not become effective until after the RFC case had commenced 10

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B. The Tenth Circuit's application of the 45-day rule here accords squarely with this Court's recent decision in *Begier*, 110 S. Ct. 2258 (1990) 12

C. The Tenth Circuit's application of the 45-day rule here creates no conflict with any other circuit court 13

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DO NOT QUALIFY AS BANKRUPTCY "CREDITORS" AND THUS WERE NOT ENTITLED TO RECEIVE NOTICES THAT ORDINARILY MUST GO TO "CREDITORS"; PETITIONERS' NON-RECEIPT OF "CREDITOR" NOTICES NEITHER STATES A DUE PROCESS VIOLATION NOR GIVES PETITIONERS A SETOFF DEFENSE AGAINST THE TRUSTEE'S PREFERENCE CHALLENGE 19

A. The Tenth Circuit's classification of Petitioners as merely preference defendants rather than bankruptcy "creditors" does not conflict with any decision of this Court and does not raise any federal question that should be settled by this Court 19

B. The Tenth Circuit has created no inter-circuit conflict by deciding that Petitioners do not qualify as bankruptcy "creditors" and that they suffered no due process violation 21

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C. The Tenth Circuit's decision concerning "creditor" status and due process rests on sound reasoning and a correct view of the law. 23

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No. 90-71

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

P.A. HACKLER, DELORES HACKLER, KENNETH D. MOORE, MARY L. MOORE, KEMAL SAIED, AND CONSTANCE G. SAIED,

Petitioners,

v.

R. DOBIE LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS COMPANY AND REPUBLIC FINANCIAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Trust & Savings Company and Republic Financial Corporation ("Trustee" or "Respondent") asks this Court to deny the request of Petitioners P. A. Hackler, Delores Hackler, Kenneth D. Moore, Mary L. Moore, Kemal Saied, and Constance G. Saied (respectively, the "Hacklers," the "Moores," and the "Saieds"; collectively "Petitioners") for a writ of certiorari to the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The Tenth Circuit's opinion below is officially reported

at 897 F.2d 1041 (10th Cir. 1990). P.A. at B-1.[1] That opinion affirmed two holdings, key here, in a consolidated order of the U.S. District Court for the Northern District of Oklahoma, which held against Petitioners and in favor of the Trustee. P.A. at C-1. The district court's order itself affirmed the same holdings in unconsolidated judgments of the Bankruptcy Court for the Northern District of Oklahoma. P.A. at D-1, E-1, F-1. In all courts below, the relevant two holdings concern the applicability of a 1984 amendment to 11 U.S.C. § 547(c)(2) and the status of Petitioners as bankruptcy "creditors."

JURISDICTION

The Tenth Circuit Court of Appeals filed its opinion on March 5, 1990, and denied rehearing on April 10, 1990. P.A. at A-1. Jurisdiction lies under 28 U.S.C. § 1254(1) for this Court to review the final decision of the Tenth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This case involves the following constitutional provisions, statutes, and regulations, which are fully reprinted in either Petitioners' Appendix ("P.A.") or Respondent's Appendix ("R.A."): U.S. Const. amend. V; 11 U.S.C. §§ 101(4)(A), 101(9), 301, 302, 303, 502(d), 502(h), 506(d), 521(1), 547(b), 547(c)(2) (1978 & 1984 versions),

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[1]Petitioners' Appendix is cited as "P.A. at _____." The Appendix to Respondent's Brief in Opposition is cited as "R.A. at _____." The certiorari petition itself (#90-71) is cited as "Pet. at _____."

548, 550, 554(b), 1126(a), 1141(d)(1); 28 U.S.C. §§ 157(b), 1334(b); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, secs. 462(c), 553(a), 98 Stat. 333, 378, 392 (1984); Fed. R. Civ. P. 7(a), 12(b), 13; Bankruptcy Rules 2002(b), 3017(d), 7001, 7007, 7012.

STATEMENT OF THE CASE

The certiorari petition here (#90-71)[2] involves two questions presented to all three courts below:

(1) whether the 1978 version or the 1984 version of 11 U.S.C. § 547(c)(2) applies to Petitioners as bankruptcy preference defendants; and

(2) whether Petitioners qualified as bankruptcy "creditors" for purposes of receiving notice and voting to confirm a reorganization plan.

The Hacklers, the Moores, and the Saieds presented these very questions to the bankruptcy court, the district court, and the Tenth Circuit. The three lower courts correctly resolved both questions against Petitioners this way:

Concerning question (1), the 1978 version of § 547(c)(2) applied because the bankruptcy case here was commenced

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[2]Though arising from the same Tenth Circuit decision, petition #90-71 here has nothing to do with certiorari petition #90-93 filed by Trustee R. Dobie Langenkamp (Respondent here in #90-71). In #90-93, Trustee Langenkamp as Petitioner challenges the jury trial misgranted by the Tenth Circuit to the Culps and the Dennises, who are the only Respondents in #90-93 and who elected not to appear as parties here in #90-71. The jury trial question of #90-93 is independent and separate from the questions raised by the Hacklers, the Moores, and the Saieds here in #90-71. These people are not parties in Trustee Langenkamp's petition #90-93 and will not be affected by the jury trial outcome of #90-93.

before the 1984 version became effective. That the Trustee's *preference proceedings* against Petitioners began after the 1984 version became law is immaterial. The statutory key is when the *bankruptcy case* commenced, and this commencement undisputedly occurred while the 1978 version was still the law. The 45-day rule of the 1978 version (repealed in the 1984 version) was therefore fully applicable to the Trustee's proceedings against Petitioners as preference defendants.

Concerning question (2), the Tenth Circuit and the district court held that Petitioners simply did not qualify as bankruptcy "creditors." They had no bankruptcy "claim" against the bankruptcy estate when the debtor filed bankruptcy. To this day, they have not disgorged the monetary transfers which they received from the bankruptcy estate and which the Trustee has challenged as bankruptcy preferences. Petitioners are thus preference defendants, nothing more. They do not qualify as bankruptcy "creditors" and thus have no right to receive the kinds of notices that the Bankruptcy Code entitles "creditors" to receive. And since Petitioners are not "creditors," they have no right to vote on whether the reorganization plan should be confirmed. As all three lower courts saw it, then, Petitioners suffered no due process violation. Although the Tenth Circuit did not say so outright, it follows that Petitioners have no setoff defense to repel the Trustee's preference attack.

These conclusions of the courts below accord squarely with the decisions of this Court as well as the decisions of other lower courts. As appears more fully below, Petitioners have shown no basis for certiorari review here.

1. **Applicability of the 45-day rule.** Republic Financial Corporation ("RFC") was an uninsured (non-bank) financial

institution in Oklahoma. RFC raised money by giving investors evidences of RFC debt known as "thrift certificates" or "passbook savings certificates." As each debt matured, the investor would present the certificate for payment by RFC. Petitioners here are six such investors. They presented their certificates and got full payment from RFC. This left no further debt owed to them by RFC.[3]

Within 90 days thereafter, RFC filed bankruptcy on September 24, 1984.[4] This marked the commencement of the bankruptcy case. On that day, Petitioners were owed nothing by RFC and were not entitled to any payment by RFC. Petitioners had no claim against the RFC bankruptcy estate. They thus were not scheduled as *creditors* of RFC and so did not receive any notices that ordinarily must go to *creditors* in a bankruptcy case.

Petitioners assert that 1,100 people were similarly situated. This is not true. Nowhere does the record say this. Petitioners characterize all persons who did not receive notices as a "class of creditors." Pet. at 6. But this glosses over the very question presented to the courts below and jumps to the conclusion that the Tenth Circuit and the district court wrongly held those persons *not* to be bankruptcy creditors.

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[3]Petitioners misdescribe their investments in RFC as "funds on deposit" or "monies on deposit" (Pet. at 4, 5). The Tenth Circuit correctly characterized Petitioners' investment certificates as "debt instruments representing a promise by the issuing party to repay." P.A. at B-7. RFC is not a bank and there are no "deposits" involved here.

[4]Republic Trust and Savings Company ("RTS"), a sister company to RFC, also filed bankruptcy on that day. Preference proceedings concerning the RTS estate were consolidated for trial with the preference proceedings against the six Petitioners.

In October of 1985, the Trustee[5] of RFC commenced adversary proceedings against Petitioners (and others) to avoid and recover payments made to Petitioners by RFC during the 90 days before commencement of the bankruptcy case. Petitioners denied any liability to return the payments. One of their defenses sought to invoke the 1984 version of the "ordinary course" exception in 11 U.S.C. § 547(c)(2). The 1984 version repealed the 45-day rule present in the precursor 1978 version. If applicable, this repeal would favor preference defendants like Petitioners. The 45-day rule shielded from preference attack only those payments which RFC made to Petitioners within 45 days after the debt was incurred. Payments received by Petitioners more than 45 days after the RFC debt was originally incurred would be fully exposed to the Trustee's challenge as preferential transfers made inside the 90-day reachback period of 11 U.S.C. § 547(b).

The RFC bankruptcy case was commenced September 24, 1984. At that time, the 1978 version of the "ordinary course" exception still controlled, with the 45-day rule fully intact in the statute. The amended statute and its repeal of the 45-day rule became effective for all *bankruptcy cases* commenced on or after October 9, 1984. Nevertheless, Petitioners sought the benefit of the amendment solely because the *preference proceedings* against them had been initiated after October 9, 1984. Petitioners saw no importance in the RFC bankruptcy case having commenced

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[5]Jack D. Jones was the initial bankruptcy trustee of RFC and RTS (*see* note 4 *supra*). R. Dobie Langenkamp (Respondent here) was appointed successor trustee of both RFC and RTS. Mr. Langenkamp appears as Respondent here in both trustee capacities because both bankruptcy estates have an interest in the outcome of the certiorari petition here (#90-71). *See* S. Ct. Rule 12.4.

before the 45-day rule had lost its statutory effect. All three courts below, however, recognized this key point. Affirming the district court (which had itself affirmed the bankruptcy court), the Tenth Circuit correctly applied the 1978 version of § 547(c)(2) and its 45-day rule in effect on the day when the RFC bankruptcy case commenced. Since the monetary transfers from RFC to Petitioners were made to satisfy debts more than 45 days old, the Tenth Circuit correctly held that the "ordinary course" exception of § 547(c)(2) was not met by Petitioners. P.A. at B-9 to B-15.

2. **Petitioners' status as "creditors."** The Trustee's Plan of Reorganization of RFC (the "Plan") was filed in December of 1985, and an Order Confirming the Trustee's Plan of Reorganization of RFC was entered in March of 1986.

After the Plan was confirmed, Petitioners as preference defendants filed amended answers in their respective adversary proceedings alleging that they had been denied due process of law in the bankruptcy case by not receiving the notices provided by the Bankruptcy Code to "creditors." Petitioners asserted that because of this lack of notice, they were not bound by the provisions of the Plan. Petitioners also asserted that the alleged due process violation entitled them to a setoff, dollar for dollar, against any judgment which might compel them as preference defendants to return the preferential payments earlier received from RFC.

Here too the courts below were not persuaded by Petitioners' assertions. The district court correctly reasoned that no due process violation had occurred because Petitioners were merely preference defendants, not bankruptcy "creditors." This status they could not have until they returned the preferential transfers made to them by RFC. Until then, Peti-

tioners' status as preference defendants did not entitle them to any notices that normally go to "creditors." And as non-creditors, Petitioners had no right to participate in the proceedings leading to confirmation of the Plan. P.A. at C-14 to C-18.

The Tenth Circuit agreed. Petitioners were simply not entitled to notices in the RFC bankruptcy case because they did not qualify as bankruptcy "creditors." To be "creditors," Petitioners had to be more than merely preference defendants. They had to have bankruptcy "claims" against the RFC bankruptcy estate. This they still lacked at the time, since they had not yet disgorged the preferential transfers. P.A. at B-17 to B-18. Absent "creditor" status, the lack of notice did not constitute any due process violation. Petitioners had actually received all the process they were due. P.A. at B-19 to B-20. Although the Tenth Circuit did not address the issue, this meant Petitioners had no setoff remedy against the Trustee.

SUMMARY OF ARGUMENT

Though it lists three questions, petition #90-71 actually presents only two questions for certiorari review. Neither question shows an inter-circuit conflict, a conflict with any decision of this Court, or a need for this Court to settle any question of federal law. Certiorari relief should thus be denied to Petitioners.

Through the first question presented, Petitioners seek to escape from the 45-day rule in the 1978 version of 11 U.S.C. § 547(c)(2). Petitioners concede that if this rule applies, they cannot use the "ordinary course" exception to defeat the Trustee's preference proceedings against them in the RFC bankruptcy case.

The 45-day rule was repealed in the 1984 version of § 547(c)(2). But the 1984 version applies only to bankruptcy *cases* commenced on or after October 9, 1984. The RFC bankruptcy *case* was undisputedly commenced before then. Therefore, the 1978 version (and its 45-day rule) applies full force to all preference *proceedings* that may be initiated in the RFC case, including the preference proceedings against Petitioners (no matter when these proceedings were initiated).

The Tenth Circuit so held. The holding coincides not only with this Court's recent decision in *Begier v. Internal Revenue Service*, 110 S. Ct. 2258 (1990), but with a truly overwhelming majority of lower court decisions. Certiorari should thus be denied on Petitioners' first presented question.

Through their second presented question, Petitioners seek status as bankruptcy "creditors" so they can assert entitlement to bankruptcy notices that ordinarily must go to bankruptcy "creditors." But Petitioners have never become "creditors" of RFC. They received preferential transfers from RFC within 90 days before bankruptcy. They never returned the preference amounts and the Trustee has not yet recovered those amounts in the preference proceedings.

Petitioners have no right to payment from RFC and therefore hold no bankruptcy "claim." Without a "claim" against the RFC bankruptcy estate, Petitioners cannot qualify as "creditors." They are at most preference defendants. This is not enough to entitle them to bankruptcy notices. The only taking of Petitioners' property will occur, if at all, in the preference adversary proceedings. Contrary to their arguments, then, Petitioners have not been deprived of due process and therefore have no setoff remedy against the Trustee. The Tenth Circuit so held. This holding creates no inter-circuit conflict and accords with the decisions of this Court. Here too certiorari should be denied.

REASONS FOR DENYING CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT CORRECTLY APPLIED THE 1978 VERSION OF § 547(c)(2) AND ITS 45-DAY RULE TO A BANKRUPTCY CASE THAT COMMENCED BEFORE THE 1984 VERSION OF § 547(c)(2) EFFECTIVELY REPEALED THE 45-DAY RULE.

A. The 45-day rule controls the RFC bankruptcy case because the rule's repeal did not become effective until after the RFC case had commenced.

On July 10, 1984, Congress enacted the 1984 Bankruptcy Amendments and Federal Judgeship Act, Pub. L. No. 98-353 (the "1984 Act" or "1984 Amendments"). The 1984 Act consists of three titles. Title I amends 28 U.S.C. on jurisdiction and procedure. Title II contains provisions for bankruptcy judgeships. Title III amends 11 U.S.C., the Bankruptcy Code. The key effective date here concerns the Title III amendments and appears in sec. 553(a) of the 1984 Act:

> Sec. 553(a). Except as otherwise provided in this section the amendments made by this title [III] shall become effective to *cases* filed ninety days after the date of enactment of this Act.

Pub. L. No. 98-353, sec. 553(a), 98 Stat. 333, 392 (1984) (emphasis added). The Act's enactment date was July 10, 1984. Since the 90th day thereafter was a holiday, the effective date of the Title III amendments was October 9, 1984. The RFC bankruptcy case was filed earlier, on September 24, 1984.

The statutory effective date has key significance here

because the 45-day rule of 11 U.S.C. § 547(c)(2) [being § 547(c)(2)(B)] was repealed by the 1984 Act. The precursor 1978 version of § 547(c)(2) provided as follows:

> (c) The trustee may not avoid under this section [§ 547] a transfer —
>
> (2) to the extent that such transfer was —
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> *(B) made not later than 45 days after such debt was incurred;*
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms.

P.A. at G-3 to G-4 (emphasis added).

In all the preference actions between the Trustee and Petitioners as preference defendants, the parties stipulated that Petitioners had satisfied § 547(c)(2)(A), (C), and (D). The Trustee contends, as all the courts below held, that the 1978 version of § 547(c)(2) governs, that its 45-day rule applies, and that Petitioners did not satisfy the 45-day rule. Petitioners concede that they did not satisfy the 45-day rule, but contend that the 45-day rule does not apply to the preference actions against them.

Pursuant to sec. 553(a) of the 1984 Act, the repeal of the 45-day rule applies only to bankruptcy cases filed on or after October 9, 1984, the statutory effective date of the repealer. The RFC bankruptcy case was filed before the repealer's effective date, but all of the adversary proceedings against

Petitioners were commenced in 1985. Petitioners contend that the word "cases" in sec. 553(a) of the 1984 Act includes adversary proceedings to recover preferential transfers. The Tenth Circuit correctly rejected this contention and concluded that "cases" in sec. 553(a) refers only to bankruptcy cases, not to individual adversary proceedings (like preference actions) that may be initiated within a bankruptcy case. The Tenth Circuit's holding does not conflict with any decision of this Court or any other lower court.

B. The Tenth Circuit's application of the 45-day rule here accords squarely with this Court's recent decision in *Begier*, 110 S. Ct. 2258 (1990).

Petitioners filed their certiorari petition #90-71 on July 9, 1990. A month earlier, this Court expressly rejected Petitioners' incorrect view of "cases" in *Begier v. Internal Revenue Service*, 110 S. Ct. 2258 (1990). American International Airlines, Inc. ("AIA") commenced its bankruptcy case on July 19, 1984. In 1986, Begier, the trustee of AIA, commenced an adversary proceeding to recover preferential transfers allegedly made to the Internal Revenue Service. This Court was aware that the AIA bankruptcy case had been commenced *prior to* the effective date of the 1984 Amendments, and that the trustee's adversary proceeding to recover the preference payments was commenced after the effective date of the amendments — precisely the facts offered by Petitioners here to urge that the 1984 version of § 547 should apply. However, this Court applied the 1978 version of § 547 in *Begier* noting as follows:

> This case is governed by 11 U.S.C. § 547(b) (1982 ed.), which reads: . . . . The statute has been

> amended to replace 'property of the debtor' with 'an interest of the debtor in property.' See n.3, infra. *The old version of § 547(b) applies to this case, however, because AIA filed its bankruptcy petition before the effective date of the amendments.*

Begier, 110 S. Ct. at 2262 n.1 (emphasis added).

The Tenth Circuit's decision to apply the 1978 version of § 547 accords squarely with *Begier*. Certiorari should thus be denied here because the issue raised by Petitioners concerning the applicability of the 1984 Amendments has been answered in *Begier*. Petitioners do not address *Begier*.

C. The Tenth Circuit's application of the 45-day rule here creates no conflict with any other circuit court.

Petitioners claim that the Tenth Circuit's application of the 1978 version of § 547(c)(2) in effect at the time of commencement of the RFC bankruptcy case conflicts with decisions of the Third, Fourth, Sixth, Seventh, and Eleventh Circuits. This seemingly potent assertion is supported by citations to a decision from each mentioned circuit without any discussion or demonstration that the assertion is sound. An examination of the cases relied upon by Petitioners reveals that no conflict exists. In fact, the cases generally do not speak to the issue raised by Petitioners. The circuit courts which have addressed the issue, including several of those relied upon by Petitioners, agree with the Tenth Circuit and are in accord with this Court's *Begier* decision.

The Eleventh Circuit decision *In re Chase & Sanborn Corp.*, 813 F.2d 1177 (11th Cir. 1987) relied upon by Petitioners involved an interpretation of 11 U.S.C. § 548. That

decision did not depend in any way upon which version of § 548 was used, and the Court did not address or consider sec. 553(a) of the 1984 Act.

Another decision offered by Petitioners is *Matter of Xonics Imaging, Inc.*, 837 F.2d 763 (7th Cir. 1988). The court in *Xonics Imaging* did not mention, much less analyze, either sec. 553 of the 1984 Act or the applicability of the 1984 Amendments to the adversary proceeding before it.

However, the Seventh Circuit *did* address the applicability of the 45-day rule arising in a pre-1984 Amendments bankruptcy case. *See In re Energy Co-Op, Inc.*, 832 F.2d 997 (7th Cir. 1987). There, the Seventh Circuit applied the 1978 version of § 547(c)(2) after reasoning just as the Tenth Circuit did here:

> Congress amended § 547(c)(2) in 1984 by deleting the requirement that the debtor make the transfer 45 or fewer days after incurring the debt. Pub. L. No. 98-353, § 462(c), 98 Stat. 378 (1984). The 45-day requirement still applies in this case because the 1984 Amendments apply only to bankruptcy cases filed 90 days after July 10, 1984.

832 F.2d at 1000 n.2.

Petitioners also rely upon *In re K. C. Machine & Tool Co.*, 816 F.2d 238 (6th Cir. 1987), in which the court quoted the 1984 version of § 554(b) (concerning abandonment). 816 F.2d at 245. The court noted that the 1984 amendment to § 554(b) merely clarified existing case law and congressional intent. *Id.* The court did not consider, discuss, or mention sec. 553(a) of the 1984 Act.

Petitioners also refer to *Estate of Lellock v. Prudential Ins. Co.*, 811 F.2d 186 (3d Cir. 1987). There the court quoted

the 1984 version of § 506(d), *see* 811 F.2d at 188, but noted that the result would be the same under either the 1978 or 1984 version of § 506(d). *See* 811 F.2d at 188 n.1. In *Lellock*, the Third Circuit was not required to interpret sec. 553(a) of the 1984 Act and did not do so.

When the Third Circuit *has* considered the applicability of the 1984 Amendments, it has found that the amendments do not apply to bankruptcy cases commenced prior to the statutory effective date of October 9, 1984. *In Matter of Tressler*, 771 F.2d 791 (3d Cir. 1985), the court noted:

> This and all other statutory references do not reflect the 1984 amendments to the Act, since these amendments only apply to cases filed after October 8, 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §553, 98 Stat. 333, 392 (1984). This case was filed on May 3, 1984 [referring to the date of commencement of the Tressler bankruptcy].

771 F.2d at 792-93 n.1.

Petitioners' reliance on *In re Harbour*, 840 F.2d 1165 (4th Cir. 1988), *vacated sub nom. Perkinson v. Huffman*, 109 S. Ct. 3234 (1989), to create an inter-circuit conflict is likewise misplaced. The opinion in *Harbour* was vacated by this Court in 1989.

The Ninth Circuit, not mentioned by Petitioners, can be counted among the several circuits which have directly addressed the issue of the applicability of the 1984 Amendments to preference actions and which have found that the amendments do not apply to adversary proceedings in bankruptcy cases commenced prior to the October 9, 1984 effective date of the 1984 Act:

The Bankruptcy Code was amended by the Bank-

> ruptcy Amendments and Federal Judgeship Act of 1984. Pub.L. No. 98-353, § 553(a), 98 Stat. 333, 392 (1984). However, those amendments do not apply to this case because BRNA filed its bankruptcy petition in 1983. *Id.; see Henderson v. Allred (In re Western World Funding, Inc.)*, 54 B.R. 470, 473 n.1 (Bankr. D. Nev. 1985). Accordingly, all references in this decision to the Bankruptcy Code are to the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (1982).

In re Bullion Reserve of North America, 836 F.2d 1214, 1217 n.2 (9th Cir.), *cert. denied*, 486 U.S. 1056 (1988).

In sum, all other circuit courts which have squarely confronted the issue of applicability of the 1984 Amendments have found that the amendments do not apply in bankruptcy cases commenced prior to the effective date of the 1984 Amendments. This is exactly what the Tenth Circuit has held here. Therefore, no inter-circuit conflict exists to warrant a grant of certiorari review.

As the Tenth Circuit recognized, Petitioners have unsoundly suggested throughout that when Congress fixed the effective date of the 1984 Amendments in sec. 553(a) of the 1984 Act, Congress blurred the established difference between "case" and "proceeding." A "case" refers to the bankruptcy case commenced with the filing of a bankruptcy petition. *See* 11 U.S.C. §§ 301, 302 and 303. A trustee's action to avoid and recover a preferential transfer is a "proceeding" which arises in a case under Title 11 of the United States Code. *See* 11 U.S.C. §§ 547, 550, 28 U.S.C. §§ 157(b), 1334(b); Bankruptcy Rule 7001. The official advisory committee note to Bankruptcy Rule 7001 is particularly helpful in understanding the distinction between "cases" and

"proceedings" in bankruptcy law:

> *Proceedings* to which the rules in Part VII apply directly include those brought to avoid transfers by the debtor under §§ 544, 545, 547, 548 and 549 of the Code; subject to important exceptions, *proceedings* to recover money or property; *proceedings* on bonds under Rules 5008(d) and 9025; *proceedings* under Rule 4004 to determine whether a discharge in a chapter 7 or 11 *case* should be denied because of an objection grounded on § 727 and *proceedings* in a chapter 7 or 13 *case* to revoke a discharge as provided in §§ 727(d) or 1328(e); and *proceedings* initiated pursuant to § 523(c) of the Code to determine the dischargeability of a particular debt. Those *proceedings* were classified as adversary *proceedings* under former Bankruptcy Rule 701.

Bankr. Rule 7001 advisory committee's note, 11 U.S.C.A. (1984)(emphasis added). The Tenth Circuit's decision here recognizes this established distinction. P.A. at B-12 to B-13.

The overwhelming majority of court decisions concur with the Tenth Circuit's conclusion that the word "cases" in sec. 553(a) of the 1984 Act means the bankruptcy case commenced with the filing of the bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303, and have applied the 1984 Amendments accordingly. *See, e.g., In re Bullion Reserve of North America,* 836 F.2d at 1217 n.2; *In re Energy Co-op, Inc.*, 832 F.2d at 1000 n.2; *Matter of Tressler,* 771 F.2d at 792 n.1; *In re Independent Clearing House,* 77 B.R. 843, 848 n.5 (D. Utah 1987); *In re Hartwig Poultry, Inc.*, 87 B.R. 30, 31 (N.D. Ohio 1988); *In re V.N. Deprizio Const. Co.*, 86 B.R. 545, 548 (N.D. Ill. 1988), *aff'd in part and rev'd in part on other grounds sub nom. Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989); *In re Terminaling, Inc.*,

72 B.R. 752, 760 (S.D. Tex. 1987), *rev'd on other grounds*, 837 F.2d 224 (5th Cir. 1988); *In re Excel Enterprises, Inc.*, 83 B.R. 427, 430-31 (Bankr. W.D. La. 1988); *In re American International Airways, Inc.*, 83 B.R. 324, 329 n.3 (Bankr. E.D. Pa. 1988); *In re Schuman*, 81 B.R. 583, 586 n.2 (Bankr. 9th Cir. 1987); *In re Sounds Distributing, Inc.*, 80 B.R. 749, 751-52 (Bankr. W.D. Pa. 1987); *In re James P. Downing & Co.*, 74 B.R. 906, 911 n.8 (Bankr. N.D. Ill. 1987); *In re Amarex, Inc.*, 74 B.R. 378, 381-82 (Bankr. W.D. Okla. 1987), *aff'd*, 88 B.R. 362, 364 (W.D. Okla. 1988); *In re Tucker Freight Lines, Inc.*, 62 B.R. 210, 212-213 (Bankr. W.D. Mich. 1986); *In re W. L. Mead, Inc.*, 70 B.R. 651, 654 (Bankr. N.D. Ohio 1986); *In re Olson*, 66 B.R. 687, 691 n.3 (Bankr. D. Minn. 1986); *In re Walkington*, 62 B.R. 989, 994 (Bankr. W.D. Mich. 1986); *Matter of Lorandos*, 58 B.R. 519, 521-22 (Bankr. S.D. Ohio 1986); *In re Demetralis*, 57 B.R. 278, 280-82 (Bankr. N.D. Ill. 1986); *In re Currie*, 57 B.R. 224, 229 (Bankr. N.D. Ohio 1986); *In re Ramey Seed Company*, 57 B.R. 425, 427 n.1 (Bankr. D. Minn. 1985); *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 370 n.30 (Bankr. D. Minn. 1986), *aff'd in part, remanded in part on other grounds*, 850 F.2d 1275 (8th Cir. 1988); *Matter of Lamanski*, 56 B.R. 981, 984 n.3 (Bankr. W.D. Wis. 1986); *In re Auto-Pak, Inc.*, 55 B.R. 403, 404 n.1 (Bankr. D.D.C. 1985); *In re Western World Funding, Inc.*, 54 B.R. 470, 473 n.1 (Bankr. D. Nev. 1985); *Matter of Almarc Manufacturing, Inc.*, 52 B.R. 582, 583 (Bankr. N.D. Ill. 1985); *In re Chase & Sanborn Corp.*, 51 B.R. 736, 737-38 (Bankr. S.D. Fla. 1985). All of the foregoing decisions involved application of the 1984 Amendments to preference proceedings under § 547 in a manner consistent with the holding of the Tenth Circuit.

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DO NOT QUALIFY AS BANKRUPTCY "CREDITORS" AND THUS WERE NOT ENTITLED TO RECEIVE NOTICES THAT ORDINARILY MUST GO TO "CREDITORS"; PETITIONERS' NON-RECEIPT OF "CREDITOR" NOTICES NEITHER STATES A DUE PROCESS VIOLATION NOR GIVES PETITIONERS A SETOFF DEFENSE AGAINST THE TRUSTEE'S PREFERENCE CHALLENGE.

A. The Tenth Circuit's classification of Petitioners as merely preference defendants rather than bankruptcy "creditors" does not conflict with any decision of this Court and does not raise any federal question that should be settled by this Court.

Petitioners assert that they were "creditors" within the meaning of the Bankruptcy Code, *see* 11 U.S.C. § 101(9), and therefore were entitled to notice of such things as the RFC disclosure statement and the Plan under Bankruptcy Rules 2002(b) and 3017(d). Petitioners assert that although they refused to return the preferential payments and have vigorously contested the Trustee's recovery efforts, they hold "contingent" claims, within the meaning of 11 U.S.C. § 101(4)(A), and thus are entitled to all of the rights of "creditors" of RFC, including all bankruptcy notices. Petitioners assert that because they were not afforded such notice, their rights to due process were violated. As a remedy, Petitioners say that any "claim" which they may ultimately have under 11 U.S.C. § 502(h) after the Trustee obtains a preference judgment against them must be valued at 100% of the "claim's"

face value and then be offset dollar for dollar against the preference judgment.

Agreeing with the bankruptcy court and the district court, the Tenth Circuit rejected Petitioners' argument and held that Petitioners were not bankruptcy "creditors" of RFC entitled to the claimed notices and that their not receiving such notices did not constitute a due process violation. The Tenth Circuit's holding on this point is fully consistent with the language and spirit of the Bankruptcy Code, the constitutional dictates of due process, and common sense.

The due process ruling of the Tenth Circuit is not in conflict with any holding of this Court, because this precise issue has never been addressed by this Court. Without any discussion or elaboration, Petitioners simply cite this Court's decisions in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *New York v. New York, New Haven and Hartford R.R.*, 344 U.S. 293 (1953); and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Pet. at 28. Although each of these decisions involves a due process challenge, each arose in a completely different context, and none involves due process requirements concerning bankruptcy notices to preference defendants who do not qualify as bankruptcy "creditors."

Of the above decisions, only *New York* arose in a bankruptcy context. It stands for the proposition that failure to give an existing lien creditor notice of a bar date was a violation of due process, and as a result, a sale of property free and clear of the creditor's liens was ineffective against the lienholder creditor. *See* 344 U.S. at 296-97. The Tenth Circuit's decision here is not in conflict with *New York* because here, unlike

there, Petitioners did not have "claims" and were not "creditors" of RFC. Nor is the Trustee here seeking to totally or forever bar any of Petitioners' claims. As shown more fully below, the Tenth Circuit's holding and reasoning are entirely consistent with the fundamental requirements of due process and the due process decisions of this Court. Petitioners have raised no federal question calling for a decision of this Court.

B. The Tenth Circuit has created no inter-circuit conflict by deciding that Petitioners do not qualify as bankruptcy "creditors" and that they suffered no due process violation.

Again without any discussion or elaboration, Petitioners also assert that the Tenth Circuit's decision conflicts with decisions of the First, Third, Tenth, and Federal Circuits. Pet. at 28-29. Petitioners, however, merely cite to a decision from each such circuit without any discussion or demonstration that these decisions involve the issue presented here. Actually, none of the cited circuit court decisions involves a preference defendant or notice to a preference defendant on matters relating to the confirmation of a reorganization plan. *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94 (1st Cir. 1974), *In re Harbor Tank Storage Co., Inc.*, 385 F.2d 111 (3d Cir. 1967), and *Brumall Industries, Inc. v. Data Design Logic Systems, Inc.*, 786 F.2d 401 (Fed. Cir. 1986), each involved a creditor of a bankrupt debtor, holding an existing right to payment on the date the debtor filed bankruptcy, who was not given notice of the bar date for filing claims or who was not given notice of, and was not included in, the debtor's reorganization plan. None of these cases involves the very different situation of a party like each Petitioner, who does not have a

right to payment from, or a "claim" against, the debtor on either the date of the bankruptcy filing, or at the time of reorganization plan confirmation, and whose claim, like each Petitioner's, would arise, if at all, only if the preferential transfer were returned to the bankruptcy estate. This is the key distinction relied upon by the Tenth Circuit here.

In fact, Petitioners' reasoning and requested relief is totally inconsistent with the very circuit decisions they cite. In *Harbor Tank*, the creditor who was denied notice of the bar date for claims was to be allowed to file its claim and be treated like all other creditors of the debtor in its class. 385 F.2d at 115-16. Petitioners, however, vigorously oppose any attempt to treat any claim arising from a returned preference like that of existing RFC creditors. The courts in *Intaco* and *Brumall Industries*, relying primarily on this Court's decision in *New York*, emphasized that due process required a right to reasonable notice before a creditor's claims were forever barred in bankruptcy. *Intaco*, 494 F.2d at 99, and *Brumall Industries*, 786 F.2d at 406 (both citing *New York*, 344 U.S. at 297). Here, if Petitioners ever have claims against the RFC estate arising under 11 U.S.C. § 502(h), after they return the preference amounts, their claims will not be forever barred but instead will be paid like all existing unsecured creditors' claims under the RFC Plan.

Petitioners also assert that the Tenth Circuit's opinion here contradicts the Tenth Circuit's earlier decision in *Reliable Electric Co. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1984). This argument, and Petitioners' reliance upon *Reliable*, was directly addressed and expressly rejected by the Tenth Circuit here. *Reliable* involved a creditor who held a prepetition claim against the debtor which arose and

was vested prepetition. Because the creditor in *Reliable* had not received notices of various of the bankruptcy proceedings, and because the debtor's funds for distributions under the plan had been fully expended, the court in *Reliable* held that the creditor's prepetition debt was not discharged. In *Reliable*, unlike this case, the lack of notice had deprived the creditor of an actual prepetition claim. The Tenth Circuit, in its opinion here, distinguished its decision in *Reliable*, finding Petitioners' citation "inapposite" and noting that in *Reliable* the creditor, unlike Petitioners, actually presented a claim against the debtor that arose "before confirmation of the Plan." P.A. at B-20 n.5.

C. The Tenth Circuit's decision concerning "creditor" status and due process rests on sound reasoning and a correct view of the law.

Bankruptcy Rule 2002(b) provides that "creditors" shall be given 25 days' written notice of the time fixed for filing objections to, and the hearing to consider approval of, a disclosure statement of a plan. Bankruptcy Rule 3017(d) directs that "all creditors" be mailed copies of the plan and various other documents. Petitioners mistakenly believe that they qualify as "creditors."

"Creditor" means an "entity that has a claim against the debtor that arose *at the time of or before* the order for relief concerning the debtor." 11 U.S.C. § 101(9) (emphasis added). The Code defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

11 U.S.C. § 101(4)(A). Petitioners assert that they held "contingent" claims and thus were "creditors." But they were simply not, and still are not, "creditors" of RFC. When the RFC Plan was confirmed, they had no "claim" (right to payment) against RFC that arose on or before the date RFC's bankruptcy petition was filed. Any prepetition "claims" they once may have had for payment from RFC were extinguished when they received full payment for their debt certificates before the RFC bankruptcy.

That Petitioners may become "creditors" in the future upon the Trustee's successful prosecution of the preference actions does not change the fact that they were not "creditors" of RFC at the time of the Plan's confirmation hearing. *Cf. Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 940-944 (3d Cir. 1985). As the Tenth Circuit recognized, any right to payment Petitioners may have against RFC by virtue of the Trustee's recovery or by their return of the preference amounts will arise and exist only if and when the money is recovered or repaid. P.A. at B-17 to B-20.

Petitioners argue that at the time of the Plan's confirmation hearing they were at least "contingent" creditors by virtue of §§ 101(9)(B) and 502(h), which provide that claims arising from the return of preferences are to be subsequently allowed as though they had arisen before the date of filing of the bankruptcy petition. The Tenth Circuit correctly rejected this argument, noting that at this point Petitioners "do not have even a *contingent* right to payment from the debtors' estates." P.A. at B-18 (emphasis added). Although subsequently treated the same as a prepetition claim for purposes of allowance and participation in the Plan, a § 502(h) claim does not "arise," and cannot be allowed or disallowed, until the

preference property is recovered by or paid to the Trustee. *See* 11 U.S.C. § 502(d). The treatment of a claim under § 502(h) does not *ipso facto* mean the claim actually existed prepetition.

This Court recently examined the scope of a "claim" under 11 U.S.C. § 101(4)(A) in *Pennsylvania Dept. of Public Welfare v. Davenport*, 110 S. Ct. 2126 (1990). This Court observed that a "claim" is a "right to payment . . ." and that "the plain meaning of a 'right to payment' is nothing more or less than an enforceable obligation . . . ." 110 S. Ct. at 2131. At the time of the RFC bankruptcy filing, and at the time of the Plan's confirmation, Petitioners did not have, and still do not have, a right to payment from, or an enforceable obligation against, the RFC estate.

Because Petitioners were not "creditors" prior to or at the time of the Plan's confirmation, and still are not "creditors" of the RFC estate, they were not entitled to the notices prescribed by Rules 2002(b) and 3017. Petitioners, in contesting the preference proceedings, deny any liability to return the funds to RFC and thus have chosen not to become "creditors" of the RFC estate. Having done so, they now cannot protest that they should have been afforded the same rights as "creditors" who are actually owed a debt by RFC.

Petitioners provide no authority for the proposition that a preference defendant is a "creditor" entitled to notices under Bankruptcy Rules 2002(b) and 3017(d), or that the Trustee's failure to provide such notices violates either the Bankruptcy Code or Rules. To the contrary, a recent bankruptcy court decision, cited with approval by the district court here but ignored by Petitioners, thoughtfully deals with this precise issue. The decision is based upon indistinguishable facts and

compels the conclusion that Petitioners were not "creditors" or "contingent creditors" of RFC and were not entitled to bankruptcy notices afforded "creditors." *See In re Southern Industrial Banking Corp.*, 66 B.R. 349, 361 (Bankr. E.D. Tenn. 1986). *See also Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1351-52 & n.14 (7th Cir. 1987) (recognizing that preference defendants are not entitled to rights of "creditors" under Bankruptcy Code), *cert. denied*, 485 U.S. 906 (1988); *In re Outlet Company Stores, Inc.*, 82 B.R. 694, 695 (Bankr. S.D.N.Y. 1988).

Despite the absence of notice requirements under the Bankruptcy Code or Rules, Petitioners assert that confirmation of the Plan without providing them notice and an opportunity to be heard constitutes a denial of procedural due process. However, neither the Code, as demonstrated above, nor procedural due process supports this assertion.

As the Tenth Court correctly noted, Petitioners clearly have a property interest in the preferential sums received by them prior to the commencement of the RFC bankruptcy case. But the deprivation of this property interest will occur, if at all, at the conclusion of the adversary proceedings. P.A. at B-19 to B-20. Therefore, no deprivation of property could have occurred at the time of confirmation of the Plan. Thus, the lack of notice of the confirmation hearing and Petitioners' lack of opportunity to vote on the Plan did not deprive them of a constitutionally protected property right without due process of law. P.A. at B-20. *See also In re Southern Industrial Banking Corp.*, 88 B.R. 174, 176-77 (Bankr. E.D. Tenn. 1987).

Notice is constitutionally adequate when "the practicalities and peculiarities of the case . . . are reasonably met."

Mullane, 339 U.S. at 314-15. Petitioners' due process argument suffers from the further infirmity of ignoring the practicalities and peculiarities of the bankruptcy reorganization process. Accepting Petitioners' due process argument would lead to the requirement that actions by a trustee to recover preferential transfers would have to be initiated and fully concluded prior to confirmation of a plan of reorganization. Such a requirement is inconsistent with the Bankruptcy Code and would be both unrealistic and impossible in most if not all bankruptcy cases.

Case law interpreting preference recovery actions certainly recognizes that such proceedings need not be concluded before, and also may be instituted after, a plan of reorganization is confirmed. *See, e.g., In re Galerie Des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 258-60 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986); *In re J.E. Jennings, Inc.*, 46 B.R. 167, 170-73 (Bankr. E.D. Pa. 1985); *In re Amarex*, 74 B.R. at 380-81. Yet under Petitioner's reasoning, in order for them to hold an allowed claim, the bankruptcy court would have to fully adjudicate each preference action and determine the amount recoverable by the Trustee, and all preference defendants would have to actually pay the preference judgments prior to allowing their claims and prior to circulating ballots for voting on the Plan. This reasoning is entirely inconsistent with the Bankruptcy Code's statutory scheme.

Petitioners essentially argue that a preference defendant is entitled to both full treatment and participation as "creditors" while at the same time withholding the preference amount. Under Petitioners' reasoning, a transferee who had a valid defense to a preference action (and therefore no liability

under § 550), would be allowed to vote on a plan of reorganization, and to object to a plan, at a time when the transferee has no interest in the estate, and when, if the transferee's defense to the preference were successful, the transferee would never have any such interest. Such a result is expressly prohibited by 11 U.S.C. § 502(d). It is fundamentally unfair to existing "creditors." And it was soundly rejected by the Tenth Circuit. P.A. at B-19 n.4 (calling Petitioners' argument "nonsensical").

11 U.S.C. § 502(h) provides that a § 550 claim, if recovered, shall be *subsequently* allowed *as if* it arose prepetition, clearly indicating that § 550 claims are treated differently than prepetition claims. Furthermore, a debtor is not required to schedule potential preference defendants as "creditors." *See* 11 U.S.C. § 521(1). If Congress had intended a transferee to be scheduled as a "creditor," it could have done so, but it did not. Rather, Congress affirmatively elected another statutory scheme for the treatment of claims arising from preference recovery actions.

Petitioners cannot contend that they would have been entitled to vote on the Plan, in that they could not, by virtue of §§ 502(d) and 502(h), hold an allowed claim necessary to vote. They cite no authority that a preference defendant in their position, with no claim against a bankruptcy estate, is entitled to vote or otherwise participate in reorganization of a debtor. 11 U.S.C. § 1126(a) provides that only the "holder of a claim or interest *allowed* under [§ 502] may accept or reject a plan." A preference defendant whose claim has not been finally adjudicated cannot hold an *allowed* claim until the preference amount has been paid and recovered. *Katchen v. Landy,* 382 U.S. 323, 330 (1966); *In re Simmons,* 705 F.2d

547, 552 (5th Cir. 1985); *In re Colonial Services Co.*, 480 F.2d 747, 749 (8th Cir. 1973); *In re Independent Clearing House Co.*, 41 B.R. 985, 1017 (Bankr. D. Utah 1984); *In re Georgia Steel, Inc.*, 38 B.R. 829, 839-40 (Bankr. M.D. Ga. 1984). Notice to a preference defendant of the disclosure or confirmation hearing therefore is totally unnecessary and superfluous.

Since Petitioners suffered no due process violation, they have no setoff defense to the Trustee's preference challenge. The Tenth Circuit's decision does not address Petitioners' asserted remedy of setoff. But a due process violation is a pre-condition to even reaching the merits of any such remedy. Accordingly, the Tenth Circuit did not have to reach this remedy issue.

CONCLUSION

Petitioners have not shown a single reason for grant of certiorari here. Their petition (#90-71) does not present any question that should be settled by this Court. Their petition does not challenge a lower court decision that conflicts with decisions of this Court. Indeed, the Tenth Circuit's decision goes hand in glove with this Court's recent *Begier* decision. Nor does their petition show any inter-circuit conflict. There-

fore, this Court should not grant certiorari review on the questions presented by Petitioners.

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In accordance with Sup. Ct. R. 24.1(f) and 24.2, other statutes, opinions and materials referred to in Respondent's Brief in Opposition are not set out in this Appendix because they are contained in the Appendix to Petitioners' Certiorari Petition (#90-71).

STATUTES AND REGULATIONS

11 U.S.C. § 101 (1982)

Definitions.

In this title —

* * *

(9) "creditor" means —

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

* * *

11 U.S.C. § 301 (1982)

Voluntary cases.

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

11 U.S.C. § 302 (1982)

Joint cases.

(a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

11 U.S.C. § 303 (1982)

Involuntary cases.

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title —

* * *

11 U.S.C. § 502 (1982)

Allowance of claims or interests.

* * *

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

* * *

11 U.S.C. § 506 (1988)

Determination of secured status.

* * *

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless —

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 521 (1982)

Debtor's duties.

The debtor shall —

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs;

* * *

11 U.S.C. § 547 (1982)

Preferences.

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of debtor —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer —

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

* * *

11 U.S.C. § 548 (1988)

Fraudulent transfers and obligations.

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily —

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after

the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may

be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section —

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment; and

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment.

11 U.S.C. § 554 (1988)

Abandonment of property of the estate.

* * *

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

* * *

11 U.S.C. § 1126 (1982)

Acceptance of plan.

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

* * *

28 U.S.C. § 157 (1988)

Procedures.

* * *

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of

the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 ~~of title 11~~ but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use of lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

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28 U.S.C. § 1334 (1988)

Bankruptcy cases and proceedings.

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(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

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